Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1819

NORMAN VAUGHN, FREDDIE BROUSSARD
AND LARRY J. BROUSSARD,
Petitioners.

VERSUS

VERMILION CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petition by Norman Vaughn, Freddie Broussard and Larry J. Broussard

JOHN K. HILL, JR.
MOUTON, ROY, CARMOUCHE,
BIVINS & HILL
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COUNSEL FOR PETITIONERS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petition by Norman Vaughn, Freddie Broussard and Larry J. Broussard

Petitioners, Norman Vaughn, Freddie Broussard and Larry Broussard, all major domiciliaries of Pecan Island, Vermilion Parish, Louisiana, petition the Court for the issuance of a Writ of Certiorari to the Supreme Court of Louisiana for the following reasons:

I.

REPORTS, OPINIONS AND JUDGMENTS OF COURTS BELOW

This case commenced via the Respondent's filing of the suits styled "Vermilion Corporation vs. Norman Vaughn," "Vermilion Corporation vs. Freddie Broussard," and "Vermilion Corporation vs. Larry Broussard," Docket Numbers 35948, 36982 and 36983, respectively, of the 15th Judicial District Court for Vermilion Parish, Louisiana, on November 7, 1975, October 12, 1976, and October 12, 1976, respectively. The three cases were consolidated by order of the Trial Court.

Vermilion Corporation moved for Summary Judgment in all cases, which Motions were granted by Judge Allen Babineaux on June 22, 1977.[1/]

These Summary Judgments were appealed to the Court of Appeal, Third Circuit, State of Louisiana, and the affirmance by that Court of Judge Babineaux' decisions is reported at 356 So.2d 551, La. App. 3rd Cir., 1978 (See 4/27/78 Southern Reporter Advance Sheet).[2/]

Petitioners applied for Writs of Review to the Supreme Court of Louisiana to examine the affirmance by the Court of Appeal. Denial of writs by the Louisiana Supreme Court is reported at 357 So.2d 558.[3/]

1/ The "Minute Entry" is Exhibit A-1, and the formal judgment, Exhibit A-2, of the Appendix.

2/ The Court of Appeal opinion is Appendix Exhibit A-3.

3/ Exhibit A-4 is the Denial of Writs.

Respondent's suits against all Petitioners asked for injunctions against Petitioners' alleged "trespassing" [4/] in Respondent's navigable canals, and further asked for damages. The Trial Court action, and its affirmance by the higher Louisiana Courts, granted and maintained the injunction.

Respondent, a leaseholding and management arm of Exxon, claimed that its artificial canals, which are similar to many other such canals throughout the Louisiana wetlands, are its private property, and that it has the absolute right to prohibit public use thereof.

The Louisiana Courts agreed with Respondent, despite the parties' agreement that these canals are navigable in fact, subject to tidal fluctuation, and have openings to the sea. The canals were built with private funds on privately owned land.

4/ Petitioners supplemented their incomes by shrimping in these canals.

II.

GROUNDS FOR INVOCATION OF JURISDICTION

(A) The Supreme Court of Louisiana denied Petitioners' Application for Writs of Review to the Court of Appeal, Third Circuit, State of Louisiana, on March 27, 1978. The Louisiana Supreme Court is the highest Court of that state, and its denial of Petitioners' application was and is a final judgment as contemplated by 28 U.S.C. 1257. Under Louisiana Law, no application for rehearing may be filed as to a denial of an application for writ of review to the Louisiana Supreme Court [See Rule IX, Section 6, "Rules of the Supreme Court of Louisiana," adopted August 31, 1974, effective January 1, 1974, Volume 8, West's Louisiana Statutes Annotated - Revised Statutes].

(B) Jurisdiction of this Court to review that Louisiana Supreme Court decision is conferred by 28 U.S.C. 1257 [3], as Petitioners here claim rights and privileges under the Constitution and Laws of the United States, primarily Article 1, Section 8, Clause 3, of the Constitution, and 33 U.S.C. 403.

III.

QUESTIONS PRESENTED FOR REVIEW

(1) If a private citizen on its privately held real property and with its private funds creates a system of artificial navigable waterways, in part via diversion, use and/or destruction of a pre-existing natural navigable waterway which flowed through that property, does the artificially developed waterway system, which is connected to other interstate navigable waters and to the sea, thereby become part of the "navigable waters of the United States," subject to a "navigation servitude" in favor of all citizens of the United States?

(2) Are channels built on private property and with private funds, which thereby are made to join with admitted and pre-existing tidal and other navigable waterways, and which are themselves navigable in fact and tidal, "navigable waters of the United States," burdened with a "navigation servitude" in favor of the public?

IV.

INVOLVED PROVISIONS OF LAW

(1) Article 1, Section 8, Clause 3, Constitution of the United States:

> "The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States. . . ."

(2) 33 U.S.C. 403, which reads, in part, as follows:

> "The creation of any obstructions not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited. . . ."

V.

STATEMENT OF THE CASE

A. CLAIMS, DEFENSE AND PROCEEDINGS

Vermilion Corporation, Lessee from Exxon Company, U.S.A., of a large portion of the Louisiana wetlands in Vermilion Parish circa the Village of Pecan Island [including lands from the Gulf Intracoastal Waterway on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre Canal on the East to Rollover Bayou on the West] brought suit in the 15th Judicial District Court for Vermilion Parish, Louisiana, against Petitioners, Vaughn, Broussard and Broussard, alleging that Petitioners had "trespassed" on the leasehold via their navigation on and shrimping in Respondent's artificial canal system. This canal system was built by Respondent's predecessors in title on the leasehold.

Petitioners answered those suits, pleading that these canals are "navigable waters of the United States," subject to a paramount right of use for and on behalf of the public. Petitioners furthermore alleged that respondent's mere act of filing suit against them for "trespass" constituted an attempt by the Vermilion Corporation to obstruct the "navigable capacity of the navigable waters of the United States," all in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States and of 33 U.S.C. 403.

Attached hereto are copies of the petitions of Vermilion Corporation against Petitioners in all three State Trial Court suits, shown in the Appendix as Exhibit B in globo. Also attached are copies of the answers of all Petitioners in these suits (Exhibit C), in which answers the federal constitutional and statutory defenses were raised.

The case thus presented in the Trial Court a clash between an alleged right of private dominion and control over waterways versus a claim by Petitioners as citizens and members of the public of a right of use of those waterways.

Vermilion Corporation filed a Motion for Summary Judgment in the State Trial Court. In reasons of June 7, 1977, the Honorable Trial Judge, Allen Babineaux, granted the Summary Judgment, holding in effect that the canals on the leasehold are private, privately owned, and subject to private control.

On June 22, 1977, the same date upon which Judge Babineaux signed the formal judgment in favor of the Vermilion Corporation, petitioners obtained an order of appeal, and their appeal to the Court of Appeal, Third Circuit, State of Louisiana, was timely perfected.

The case was briefed and argued in the Court of Appeal and on February 6, 1978, by Judge Jerome Domengeaux, that court rendered its decision affirming Judge Babineaux' granting of Respondent's Motion for Summary Judgment in all three cases. Copies of all briefs of all parties in the Court of Appeal appear in the Appendix as Exhibit D in globo.

Petitioners applied directly to the Louisiana Supreme Court for the issuance of writ of certiorari of review seeking reversal of the judgments of the Trial Court and of the Court of Appeal, Third Circuit. The Louisiana Supreme Court denied this application on March 27, 1978, and this Petition for Certiorari seeks review of that denial.

B. FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

The ancestors in title of the Vermilion Corporation at various times since 1940 built with private funds on their privately owned lands in Vermilion Parish, Louisiana, canals which generally speaking are 60 feet in width by 8 feet in depth.

The canal system formed thereby is entirely unitary in that no part of it is sealed or separate from any other part. Furthermore, these canals, from their beginnings on or near the South Side of Pecan Island, Louisiana, flow southerly through the Louisiana marshlands a few miles into the Gulf of Mexico, and the canal system otherwise connects with Fresh Water Bayou Canal and the Gulf Intracoastal Waterway, which are clearly "navigable waters of the United States," subject to a navigation servitude.

The parties agree that this entire artificial canal system, which is most often referred to by the residents of the area as the "Humble Canal," is subject to tidal fluctuation, and is navigable in fact.

In the Trial Court, Vermilion Corporation, via its Motion for Summay Judgment, admitted the truth of almost all of the Petitioners' factual allegations, which Petitioners believe supported their claim that the Humble Canal is navigable in fact, navigable in law, is in interstate commerce, and thus is part of the "navigable waters of the United States", not subject to private dominion and control.

The only factual allegation made by Petitioners which Vermillion Corporation disputed in the Courts below was that, in building this artificial canal system, Respondent's ancestors in title had used, impaired, and finally destroyed the factual navigability of certain natural navigable waterways which

formerly existed in the area on and across which the Humble Canal now flows.

Specifically, at all times in this litigation, Petitioners have alleged that the old Fresh Water Bayou, on and prior to the time of the development of the artificial "Humble Canal," existed in a natural state, flowed from a point North of Pecan Island, southerly to the Gulf of Mexico, and was a natural and actual marine highway of commerce for the citizens of the Pecan Island area. Indeed, it was the contention of Petitioners in all Courts below that old Fresh Water Bayou had been used prior to the development of the artificial "Humble Canal" to transport cattle, groceries, human beings and the United States Mail to and from the Pecan Island area.

Most important, Petitioners alleged and swore to in affidavits filed in opposition to the Motion for Summary Judgment in the Trial Court, that those natural navigable waterways [particularly Fresh Water Bayou] became unusable as such only when the Vermilion Corporation's ancestors in title built their artificial navigable waterways in the area.

In short, Petitioners claimed that natural navigable waterways, once used as such, were impaired and destroyed by the artificial creations of a private corporate developer, and it is this assertion which was and is in vehement dispute between the parties.

All Courts below held in effect that, even assuming all facts alleged by Petitioners to be true, Petitioners' claims of rights and privileges under the Constitution and laws of the United States are of no moment, as the State of Louisiana views privately developed canals on private lands to be private property, despite their navigability, despite their connection with other maritime highways of commerce, and despite their possibly having destroyed via their creation a pre-existing natural navigable waterway system.

The federal questions in this matter were raised in Articles 3, 15 and 16 of the Petitioners' answers to the suits in the Trial Court, and were raised factually in their affidavit filed in opposition to the Respondent's Motion for Summary Judgment in the Trial Court.

These questions were furthermore maintained and reurged in all proceedings and courts to which this case was addressed following the Trial Court's decision. Copies of the Petitioners' affidavit and of their brief in support of their Petition for a Writ of Review to the Supreme Court of Louisiana are attached as Exhibits E and F.

VI.

ARGUMENT

QUESTION 1

IF A PRIVATE CITIZEN ON ITS PRIVATELY HELD REAL PROPERTY AND WITH ITS PRIVATE FUNDS CREATES A SYSTEM OF ARTIFICIAL NAVIGABLE WATERWAYS, IN PART VIA DIVERSION, USE AND/OR DESTRUCTION OF A PRE-EXISTING NATURAL NAVIGABLE WATERWAY WHICH FLOWED THROUGH THAT PROPERTY, DOES THE ARTIFICIALLY DEVELOPED WATERWAY SYSTEM, WHICH IS CONNECTED TO OTHER INTERSTATE WATERS AND TO THE SEA, THEREBY BECOME PART OF THE "NAVIGABLE WATERS OF THE UNITED STATES," SUBJECT TO A "NAVIGATION SERVITUDE" IN FAVOR OF ALL CITIZENS OF THE UNITED STATES?

The Louisiana wetlands are crossed with many artificial canals. The private developers of those canals would be shocked if one were to suggest that these streams are "navigable waters of the United States," subject to a public right of navigation. But it would also be a great shock to the members of the public who regularly exercise that right of navigation via fishing, shrimping, and traveling on these canals to be told that these waters are "private property."

The reason both groups would be so shocked is that there simply has not been a lot of thinking by Louisianians devoted to the resolution of this clash of interests. With some exceptions, they have largely co-existed – neither has bothered the other much of the time, while both have felt virtually all of

the time that either could tell the other where to get off at any time.

Louisiana's view of this matter is best seen in *Audubon Society v. White*, 202 So.2d 660, La. App. 3rd Cir., 1974, which stands for a proposition which Petitioners believe cannot be countenanced under the Constitution and laws of the United States. Audubon holds that a waterway can be "navigable," and presumably may be part of the "navigable waters of the United States," but if it was built on private properly with private funds, is subject to private dominion and control.

Petitioners believe that there are no private "navigable waters of the United States" in general, and that the "Humble Canal" in particular is not subject to private control, for the following reasons:

Article 1, Section 8, Clause 3 of the Constitution gives to the United States jurisdiction of the surface of "navigable waters of the United States." *Martin v. Waddell's Lessee*, 41 U.S. 367, 10 L.Ed. 997 [1842]. See also *Harmon v. Chicago*, 147 U.S. 411, 15 S.Ct. 306, 37 L.Ed. 216, 1893.

"Navigable waters of the United States" are not subject to private dominion and control, and the public has a servitude of navigation thereon:

> "The concept of 'navigable waters' grew out of the 'public common of piscary,' i.e., the right of the common people of England to travel upon the waters and to fish them.
>
> * * *
>
> "The term 'navigability' has many legally distinct applications. [1] It may determine title to river and

lake beds. [2] It has been the touchstone of congressional jurisdiction over waters via the Commerce Clause. [3] It embodies the navigation servitude, a modern declaration of the common law right of access of waters. In addition [4] Admiralty jurisdiction in federal courts flows from the general concept of navigability."

United States v. Kaiser-Aetna, 408 F.Supp. 42, 48-49, D.C., Hawaii 1976.

If Vaughn, Broussard and Broussard had been allowed in the State Trial Court to proceed on the merits, they would have defended the Vermilion Corporation's action for trespass via, inter alis, attempting to prove as a fact the "navigability" of Fresh Water Bayou and other natural waterways in the Pecan Island area prior to the development of the Humble Canal system.

In so proving, Petitoners would have shown that prior to the development of the artificial canal system, there was a network of natural "navigable waters of the United States" in the area, subject to a "navigation servitude" in favor of the public, as they would have shown that there existed bodies of water suitable for use for transportation and commerce, which could have been made even more suitable therefor by reasonable improvements, which were actually used for both private and commercial navigable purposes, which were subject to tidal fluctuation, and which opened to and provided access to the open sea. See the various criteria for determination of status as "navigable waters of the United States" in *United States v. Stoeco Homes*, 498 F.2d 610, 3rd Cir. 1974 and *United States v. Moretti*, 478 F.2d 428, 5th Cir., 1973.

In *United States v. Kaiser-Aetna, supra*, it was claimed that Kuapa Pond, prior to artificial development which enlarged it

and which opened it to the ocean, was part of the "navigable waters of the United States," burdened with a "navigation servitude." Although the particular factual and legal background of Hawaiian tidal ponds dictated a result in that case irrelevant to the instant matter, a particular portion of the opinion of the Hawaii District Court shows exactly why proof in Petitioners' case of pre-existing navigable status of Fresh Water Bayou, et al, would have dictated ultimately a ruling against the Vermilion Corporation and in favor of Petitioners on the core questions of this lawsuit:

"If Kuapa Pond was navigable water of the United States prior to its development by defendants, such development would not have destroyed that status, absent a specific congressional abandonment of the waters, and the marina would unquestionably be subject to the public's right of access. See *Economy Light & Power Co. v. United States*, 256 U.S. 113, 124, 41 S.Ct. 409, 65 L.Ed. 847, [1921]."

Supra, Page 49.

Furthermore, if via building of an artificial navigable waterway system in the Pecan Island, Louisiana area the Vermilion Corporation's ancestors obstructed or destroyed the "navigable capacity" of a "highway of commerce," these oil companies would have *ipso facto* violated 33 U.S.C. 403, which states that no person may pose any "obstruction" to the "navigable capacity" of "navigable waters of the United States." *United States v. Republic Steel*, 362 U.S. 482, 4 L.Ed.2d 903, 80 S.Ct. 884 [1960], says that "obstruction" in Section 403 is not limited to the listing which appears in the statute, but comprehends any kind or type of obstruction.

May the law countenance the development of a privately controlled artificial waterway system via the use and destruction

of a pre-existing and natural public waterway system? Petitioners think not, and believe that the remedy, as *United States v. Kaiser-Aetna* shows, for the abridgement of the constitutionally based public right of navigation and for the specific violation of 33 U.S.C. 403, is to say that the navigation servitude which existed on the natural navigable waterway prior to the development of the artificial waterway system, but which was destroyed in fact via that development, is simply transposed in law to and upon the new artificial canal system.

Judge Allen Babineaux thought it made no difference whether or not there was in the Pecan Island area prior to 1940 a natural navigable waterway system, which was impaired or destroyed via the subsequent development of a "private" waterway system. The Court of Appeal, Third Circuit, and the Louisiana Supreme Court, agreed. Accordingly, since the resolution of the factual dispute of the parties on this point was erroneously held by the Courts below to have made no difference, a Motion for Summary Judgment was wrongly granted, its granting was erroneously affirmed, and Petitioners, as citizens and members of the public, were denied a right of use of navigable waterways which no state and no oil company is supposed to be able to take from them.

QUESTION 2

ARE CHANNELS BUILT ON PRIVATE PROPERTY AND WITH PRIVATE FUNDS, WHICH THEREBY ARE MADE TO JOIN WITH ADMITTED AND PRE-EXISTING TIDAL AND OTHER NAVIGABLE WATERWAYS, AND WHICH ARE THEMSELVES NAVIGABLE IN FACT AND TIDAL, "NAVIGABLE WATERS OF THE UNITED STATES," BURDENED WITH A "NAVIGATION SERVITUDE" IN FAVOR OF THE PUBLIC?

The parties agree that the sixty foot wide by eight foot deep artificial canal system developed by Vermilion Corporation's ancestors in title is navigable in fact: Crew boats, cargo boats, fishing boats, drilling barges, and similar vessels have regularly used these canals since their creation. The primary purpose of the canals is to further petroleum exploration and production operations in the area. The canals secondarily are used by sportsmen and fishermen as fishing grounds and as a means of ingress to and egress from the Gulf of Mexico and various fresh waters in the area.

One can launch a boat at the headwaters of this canal system and navigate South into the Gulf of Mexico, or East into West Chenier Au Tigre Canal or Fresh Water Bayou Canal, or North via Schooner Bayou to the Gulf Intracoastal Waterway, and thus sail from Pecan Island unimpeded to Jacksonville, or Tierra del Fuego.

It is also undisputed that the waters of this canal system are brackish. Many of the fish species therein are of salt water origin. Daily these canals rise and fall perceptibly with the tides.

In *United States v. Sexton Cove Estates*, 389 F.Supp. 602, S.D. Fla., 1975, and in *United States v. Kaiser-Aetna, supra*,

Page 53, one sees unquestioned recognition of the proposition that, although a canal system be developed with private funds on private property, if the canals created thereby are navigable in fact and are subject to tidal fluctuation and otherwise connect with other "navigable waters of the United States," the canals so created themselves become "navigable waters of the United States," and thus become burdened with a "navigation servitude."

The concept of private dominion from the sky to the center of the earth for him who owns the land ceases now, as it always has, when the private owner digs a ditch sufficiently large, and connects it with other navigable waterways to such an extent, that enough water flows through that ditch to support commerce. The private owner's property is not thereby expropriated. There simply arises, for purposes of surface use of the waterways, a servitude in favor of the citizens of the United States generally to navigate over and fish upon those waters, and to that limited extent, the private owner who built the canals cannot control their use.

The Trial Court, in following *National Audubon Society v. White*, the Court of Appeal, Third Circuit, in originally rendering the opinion therein and in following it in this case, and the Louisiana Supreme Court, in its denial of writs, committed error, for, despite the fact that it is undisputed between the parties to this litigation that the "Humble Canal" system is navigable in fact and connected to other waterways navigable in fact and law, all Louisiana Courts held that as a matter of law it made no difference; that the canals were nevertheless private property, subject to private dominion and control. Louisiana thus firmly reiterated in response to this second of Petitioners' contentions its old idea: No matter how navigable in fact and law, no matter how obviously connected to interstate commercial waterways, no matter how intimately joined to and associated with the Gulf of Mexico, the canals built by, primarily,

the oil companies which have explored and produced the Louisiana wetlands remain their private property in all respects.

It is time, Petitioners believe, that Louisiana's law be made to yield to the principles which have grown out of the "common right of piscary" and finally out of the Supreme Law of the Land: The "navigation servitude" must have the same effect in Louisiana, and for the oil companies, as it does in other places and for other persons.

Respectfully submitted,

MOUTON, ROY, CARMOUCHE,
BIVINS & HILL

By: John K. Hill, Jr. per m.a.s.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LOUISIANA 70502
(318) 233-7430

COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition and Attachments have been duly mailed to counsel for Respondent, Mr. Charles Sonnier, Attorney at Law, P. O. Box 519, Abbeville, Louisiana 70510.

Lafayette, Louisiana, June 22, 1978.

John K. Hill, Jr. jr.m.s.

JOHN K. HILL, JR.

EXHIBIT A-1

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15TH JUDICIAL DISTRICT COURT

DOCKET NUMBER 35948

PARISH OF VERMILION, LOUISIANA

MINUTE ENTRY

The Court is concerned here with a motion for summary judgment wherein the plaintiff claims there is no material issue of fact and prays for a permanent injunction prohibiting defendant from trespassing on his lands. The alleged trepasses involve the use by defendant of certain canals on plaintiff's property.

The defendant opposes the motion essentially by claiming there is material issue of fact as to whether or not the construction of the canals on plaintiff's property has "impaired or interrupted the navigability of an already existing natural waterway."

To support their position that the impairment of the navigability of a natural waterway is an issue material to this case, the defendant cites *Ilhenny v. Broussard*, 135 So. 609, (Sup. Ct. 1931). Although the Court in that case does note that there is "some authority" for the proposition that the public is entitled to the use of a new canal which obstructs a navigable waterway,

it ultimately rejects that authority, and denies the defendant the right to use a privately built canal.

The facts this Court feels are important are that the canals were constructed with private funds on private property; that the canals have been maintained privately and the use thereof has been restricted use with permission only; and, there are numerous trepass signs indicating the private nature of the canals involved.

We distinguish *D'Albara v. Garcia*, 144 So. 2d 911, and *Discon v. Saray*, 265 So. 2d 765, as did the Third Circuit in *National Audubon Society v. White*, 302 So. 765 660, by noting that those cases found that the waterways involved were either part of the public domain or had been dedicated for the public use. In the case at hand we find the canals are privately maintained and have not been dedicated for the public use.

We find that the Third Circuit's statement of the law in *National Audubon Society v. White* and the Supreme Courts decision in *Ilhenny v. Broussard* are controlling; and even taking the allegations of defendant, that the canals have obstructed or diverted "navigable waters of the United States" we must conclude that navigable waterway constructed with private funds on private land is a private thing and not open for public use.

Therefore, this Court grants the motion for summary judgment, and permenantly enjoins defendant, Norman Vaughn, from trespassing on any lands or canals located within the confines of the properties leased by plaintiff.

Cost of these proceedings are to be borne by defendant. Judgment in accordance with the foregoing to be signed upon presentation.

Lafayette, Louisiana this 7 day of June, 1977.

/s/ illegible
DISTRICT JUDGE

FILED 6-9 19 77

/s/ Clara F. Frederick
Deputy Clerk of Court
Vermilion Parish, La.

FILED THIS 7

DAY OF June 19 77

/s/ Jan Hebert
DY. CLERK OF COURT

EXHIBIT A-2

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15TH JUDICIAL DISTRICT COURT

NUMBER: 35,958

VERMILION PARISH, LOUISIANA

VERMILION CORPORATION

VERSUS

LARRY L. BROUSSARD

15TH JUDICIAL DISTRICT COURT

NUMBER: 36,983

VERMILION PARISH, LOUISIANA

VERMILION CORPORATION

VERSUS

FREDDIE BROUSSARD

15TH JUDICIAL DISTRICT COURT

NUMBER: 36,982

VERMILION PARISH, LOUISIANA

JUDGMENT

The Motion For Summary Judgment filed herein by Vermilion Corporation came to be heard on May 31, 1977; those present were:

John K. Hill, Attorney for Defendants
Norman Vaughn, Larry L. Broussard and
Freddie Broussard;

Charles R. Sonnier and John E. Ortego,
Attorneys for Plaintiff Vermilion Corporation.

After reviewing the pleadings, briefs, motions, affidavits, depositions, stipulations, and hearing the arguments of counsel, the Court considering that there is no genuine issue as to material facts, and that Mover is entitled to a Judgment as a matter of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that there be Judgment herein in favor of the Plaintiff, Vermilion Corporation, and against the Defendants, Norman Vaughn, Larry L. Broussard and Freddie Broussard, permanently prohibiting, restraining and enjoining defendants from trespassing on any lands or canals located within the confines of the properties leased by Vermilion Corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of these proceedings are to be born by the defendants.

Judgment rendered in Lafayette, Louisiana, on the 7th day of June 1977; read and signed at _____, Louisiana, on the _____ day of June, 1977.

_____

JUDGE

APPROVED AS TO FORM:

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER

BY: /s/ John E. Ortego
JOHN E. ORTEGO
Attorneys for Plaintiff
Vermilion Corporation

MOUTON, ROY, CARMOUCHE, HAILEY, BIVENS, & MCNAMARA

BY: _____
JOHN K. HILL
Attorneys for Defendants,
Norman Vaughn, Larry R. Broussard
and Freddie Broussard

EXHIBIT A-3

NO. 6258

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

VERMILION CORPORATION

Plaintiff-Appellee

VERSUS

NORMAN VAUGHN

Defendant-Appellant

Appeal from the 15th Judicial District Court, Parish of Vermilion, State of Louisiana; Hon. Allen M. Babineaux, District Judge, Presiding.

Before CULPEPPER, DOMENGEAUX, and WATSON, Judges

DOMENGEAUX, JUDGE

This suit involves the right of the public to use man-made navigable canals on private property constructed and maintained with private funds.

This case was consolidated for trial and appeal with *Vermilion Corporation v. Freddie Broussard*, _____ So.2d _____, No. 6259, (La. App. 3rd Cir. 1978), and *Vermilion Corporation v. Larry J. Broussard*, _____ So.2d _____, No. 6260 (La. App. 3rd Cir. 1978).

The issues are the same in these three cases, and will be discussed herein, although separate opinions in each case are being rendered on this day.

Vermilion Corporation, plaintiff-appellee, leases 125,000 acres of land in Vermilion Parish owned by the Exxon Company. The land is traversed by a system of man-made canals. The canals are approximately 60 feet wide and 8 feet deep, are subject to tidal fluctuations, and are navigable in fact. They were constructed with private funds and have been under the continuous control, possession, and supervision of Vermilion Corporation, Exxon Company, and all prior owners since the 1900s.

The canal system enters other naturally navigable waterways and lies between the Intracoastal Canal on the north, the Gulf of Mexico on the south, West Cheniere Au Tigre Canal on the east, and Rollover Bayou on the west. The canals are used to facilitate hunting, trapping, and fishing activities, and are also used by the Exxon Company for hydrocarbon exploration and development activities. Vermilion Corporation subleases portions of the land to hunters, trappers, and fishers. The right to use the canals is a part of the lease arrangement.

In order to control access to the land and the canals, over 400 "No Trespassing" signs are posted in various locations. In addition persons have been continuously employed to supervise activities in the canals and on the land. On numerous occasions Vermilion Corporation has prohibited persons from entering and using the property.

The present controversy arose when the defendants-appellants, Norman Vaughn, Freddie Broussard, and Larry J. Broussard, continued to enter the property and travel the canals in order to engage in commercial fishing and shrimping activities without obtaining plaintiff's permission. These individuals

disregarded several written warnings issued by plaintiff. Consequently, these suits were filed seeking permanent injunctions enjoining the three defendants from trespassing on the property and in the canals and damages. [1]

After affidavits and a deposition were filed into the record, the corporation moved for summary judgments, which were granted by the trial court. Permanent injunctions against Vaughn and the Broussards were issued. They have perfected devolutive appeals.

Defendants contend on appeal that the trial court erred in two respects:

1. In finding that there was no issue of material fact and, therefore, in granting the motions for summary judgment, and

2. In finding that the canal could be controlled by the plaintiff and, therefore, in granting the permanent injunctions.

I. SUMMARY JUDGMENTS

Article 966 of the La. Code of Civil Procedure provides:

> "The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits, may move for a summary judgment in his favor for all or part of the relief for which he has prayed. The plaintiff's motion may be made at any time after the answer has been filed. The defendant's motion may be made at any time.

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1 No proof of damages was introduced in the District Court and no mention of damages is made on appeal. We, therefore, will not discuss the issue.

> The motion for summary judgment shall be served at least ten days before the time specified for the hearing. The adverse party may serve opposing affidavits prior to the day of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law."

In the present case the parties are in agreement on all relevant facts that are genuinely material to this case and upon which a judgment can be rendered. There is no question that the canals are navigable and were built and maintained with private funds on private property. It is not contested that defendants did engage in fishing and shrimping activities in the canals without permission.

Defendants contend, however, that there is a fact in dispute which is genuinely material to this litigation and that summary judgment was improper. They claim that plaintiff's system of artificial waterways destroyed the navigability of surrounding natural waterways. They argue that this is material because, if true, the court could conclude that the system of artificial waterways was substituted for the pre-existing natural system of navigable waterways. If such a conclusion were reached, the canals would not be private and could not be privately controlled under state and federal law.

We do not agree. A similar argument was raised in *Ilhenny v. Broussard*, 172 La. 895, 135 So. 669 (1931), the facts of which are almost the same as in the present case. The plaintiff in that case, E. A. McIlhenny, constructed a private canal on his property. The defendant, Broussard, continued to use this canal without McIlhenny's permission. McIlhenny sought to

enjoin Broussard from using his private waterway. The contention was made that the waters from a natural canal were diverted by the man-made waterway and that therefore the man-made waterway was substituted for the natural waterway. The Louisiana Supreme Court rejected the argument stating that the diversion of water from a natural channel by a private man-made waterway does not give rise to a right of the public to use the man-made waterway. [2]

Defendants also contend that this litigation is too important to be disposed of by summary judgment. We fail to see the validity of this argument. Simply because there is no issue of material fact does not mean that the courts will not give a case full and complete treatment. Summary judgment merely avoids a full trial where the need does not exist. The effect of a case on Louisiana law is not a valid reason for denying a party's right to summary judgment.

We therefore find no error on the part of the trial court in granting summary judgment in favor of plaintiff.

II. THE INJUNCTIONS

Defendants contend that the injunctions should not have been granted as a matter of state and federal law. They argue

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2 *See also, National Audubon Society v. White*, 302 So.2d 660 (La. App. 3rd Cir. 1974), *writ denied* 305 So.2d 542 (La. 1975) (No error of law), discussed *infra*.

that under La.R.S. 14:97 [3] and under 33 USCA Sec. 403 [4] (§ 10 of the Rivers and Harbors Act) a private individual may not exert dominion over a navigable waterway.

With regard to state law, this court discussed the application of La.R.S. 14:97 to a private canal in *National Audubon Society v. White*, 302 So.2d 660 (La. App. 3rd Cir. 1974), writ denied 305 So.2d 542 (La. 1975), a case which defendants contend was erroneous and should be overruled.

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3 §97. Simple obstruction of a highway of commerce

Simple obstruction of a highway of commerce is the international or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable waterway, road, highway, thoroughfare, or runway or an airport, which will render movement thereon more difficult.

Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both.

4 §403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The facts of *Audubon* mirror those in the present controversy. In that case a private canal was constructed in 1912 by E. A. McIlhenny on his property in Vermilion Parish. The canal, which was the same canal involved in *Ilhenny v. Broussard, supra*, was navigable and connected with Vermilion Bay. In 1924 a portion of the land, including a part of the canal, was donated to the National Audubon Society. That organization used the property to operate the Paul J. Rainey Wildlife Sanctuary. The Audubon Society maintained their portion of the McIlhenny canal with its own funds. Access to the canal was restricted by the Audubon Society as it was restricted prior to the donation. The defendant in that case, Joseph White, used the canal without permission for fifty years to haul cattle, cotton, vegetables, and fruit to the market. In 1971 and 1972 he was notified by the Audubon Society that he could no longer use the canal. These notices were disregarded and suit for a permanent injunction to enjoin him from using the canal followed.

This court granted the injunction and held that a canal built entirely on private property with private funds for private purposes is a private thing. White contended that a landowner was prohibited from obstructing any navigable waterway, regardless of whether it was constructed with private funds, by virtue of La. R.S. 14:97, as applied by the Supreme Court in *Discon v. Saray, Inc.*, 262 La. 997, 265 So.2d 765 (1972), and the Fourth Circuit in *D'Albora v. Garcia*, 144 So.2d 911 (La. App. 4th Cir. 1962).

In *Discon*, landowners whose property bordered on a navigable canal dedicated for the use of the property owners, sought to enjoin another landowner from obstructing a portion of the canal. The Supreme Court concluded that plaintiffs were entitled to injunctive relief under La. R.S. 14:97. In *D'Albora* an injunction was sought to enjoin the owner of land from restricting passage on a navigable canal running through his

property. The canal was dug by the State of Louisiana to obtain dirt for the construction of a highway. The Fourth Circuit affirmed the action of the trial court in granting the injunction on the basis of La. R.S. 14:97.

We distinguished *Discon* and *D'Albora* in *Audubon* on the basis that the canals in those cases were either built with public funds or involved a dedicated right of way. We held that La. R.S. 14:97 was inapplicable to a private canal which was not part of the public domain or was not dedicated to the public use, stating the following:

> "We distinguish the D'Albora and Discon cases from the instant suit, because in each of those cases the canal was either a part of the public domain or it had been dedicated for use by the owners of property in the subdivision in which the canal was located.
>
> We have concluded that LSA-R.S. 14:97 does not apply to a privately owned canal, even though it may be navigable. We agree with the views expressed by Professor A. N. Yiannopoulos, in discussing the case of Discon v. Saray, Inc., supra, where he stated:
>
> 'The majority opinion necessarily rests on the assumption that the canal in question was burdened with a servitude of public use. *Indeed, it would be inconceivable to apply article 97 of the Criminal Code to a strictly private waterway.* The majority proceeded on the idea that this article was applicable because the canal was navigable, and, therefore, was burdened with a servitude of public use; in the alternative, that the canal was burdened with a servitude of public use by virtue of dedication. *No one, however, should be prepared to accept the proposition that all navigable waterways in Louisiana are subject to public use merely by virtue of the fact they are navigable. A privately owned canal, though navigable in fact, may not be subject to public use, for the same reasons that a private road, though used by commercial traffic, may not be subject to public use. Thus, the disposition of the case would be correct only if the canal in question had been dedicated to public use.'* (Emphasis added)"

303 So.2d 660, 667-668.

We are convinced that the decision of *National Audubon Society v. White* was correct and apply it to this case. We hold that a canal on private property constructed and maintained with private funds and used for private purposes is a private canal subject to private control.

With regard to federal law, defendants have cited several federal cases [5] for the proposition that under 33 USCA Section 403, private individuals cannot control navigable waterways.

We have examined all of the federal cases and found them completely distinguishable from the present litigation. The cited cases involved situations where the United States was

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5 *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960); *United States v. Twin City Power Company*, 350 U.S. 222 (1956); *United States v. Willow River Power Company*, 324 U.S. 499 (1945); *United States v. Appalachian Electric Power Company*, 311 U.S. 377 (1940); *United States v. Sexton Cove Estates, Inc.*, 389 F.Supp. 602 (S.D.Fla. 1975), affirmed in part, reversed in part, 526 F. 2d 1293 (5th Cir. 1976); *United States v. Cannon*, 363 F. Supp. 1045 (D.Del. 1973); *United States v. Pot-Nets, Inc.*, 363 F. Supp. 812 (D.Del. 1973); *United States v. Underwood*, 344 F. Supp. 486 (M.D.Fla.1972); *United States v. 412.715 Acres*, 53 F. Supp. 143 (N.D. Calif. 1943).

either seeking to expropriate private property or seeking to prevent the impairment of naturally navigable waterways.

In any event, we fail to see how 33 USCA Section 403 would forbid a landowner from prohibiting the general public from using his private canal. The statute grants authority to the Chief of Engineers and the Secretary of the Army to control waterways, but it does not grant individuals the unrestricted right to use a privately owned navigable canal. Our research has revealed the case of *United States v. Kaiser-Aetna*, 408 F. Supp.42 (D.Ha.1976), in which the United States attempted to use the same legislation to force Kaiser-Aetna to open a private marina in Hawaii to the public. The marina was originally a lagoon, Kuapa Pond, which was used as a fishing spot by the Hawaiian natives. The lagoon connected with Maunalua Bay, a navigable waterway. Under Hawaiian property law there was no question that the fish pond was private property. Kaiser-Aetna acquired interests in the pond and surrounding land. It developed a subdivision and transformed the fish pond into a marina. Use of the marina was restricted and all commercial vessels were excluded.

The federal court recognized the regulatory power of the federal government under its admiralty powers but it refused to find that the United States could appropriate the waterway to public use without reasonable compensation. The Court stated:

> ". . . . [P]rivate 'fast' lands and waters when made navigable by improvements or which could be made navigable are subject to Congressional regulation. Nevertheless while Congress may provide for the improvement and regulation of navigation, and take necessary action to prevent interference or obstruction to navigation, it cannot impose a *public* navigation servitude upon such a privately constructed

> waterway without paying a reasonable compensation for the use thereof.
>
> Here then, since Kaupar Pond has been transformed into navigable waters used in commerce, the marina has therefore become subject to regulation by Congress and within admiralty jurisdiction. It does not follow, however, that the United States can, without payment, appropriate those waters for *public* use and deprive the defendants of their investment or any return on it." [Footnote omitted]

408 F. Supp. 42, 54.

If the public has no right of use on a natural waterway made navigable by private funds under federal law, then *a fortiori* it has no right of use on an artificial navigable waterway constructed with private funds.

Thus, under state and federal law a canal on private property constructed and maintained with private funds for private purposes is a private canal, the use of which can be restricted by the landowner or his assigns. The injunctions in these cases in favor of the landowner's lessee was proper.

For the above reasons we affirm the judgment of the District Court. All costs are to be assessed against the defendant-appellant.

AFFIRMED.

EXHIBIT A-4

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

VERMILION CORPORATION March 27, 1978

V.

NORMAN VAUGHN NO. 61,736

In re: Norman Vaughn, Freddie Broussard and Larry J. Broussard applying for Certiorari, or writ of review, to the court of Appeal Third Circuit Parish of Vermilion

---

Writ denied.

WFM

JWS

FWS

AT JR

DIXON, CALOGERO, J. J. vote to grant the writ.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
March 27, 1978

/s/ illegible
DEPUTY CLERK

EXHIBIT B (in globo)

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15TH JUDICIAL DISTRICT COURT

NUMBER: 35948

VERMILION PARISH, LOUISIANA

PETITION FOR PERMANENT INJUNCTION
AND DAMAGES

The petition of VERMILION CORPORATION, a corporation organized under the laws of the State of Delaware and authorized to do business in the State of Louisiana, with respect, represents that:

1.

Petitioner is the Lessee of and is in possession of certain lands in Vermilion Parish, Louisiana, which lands are fully described in the copy of the lease and amendments attached hereto and marked Exhibits "A", "B", and "C".

2.

Petitioner, pursuant to the terms and provisions of said lease and amendment, and under the authority therein granted is entitled to bring this action in the place and stead of the Lessor named in said lease and amendment, its successors or assigns.

3.

Norman Vaughn, a resident of Vermilion Parish, Louisiana, has without permission of your petitioner, trespassed on the lands of petitioner and more particularly in the private canals located within said lands, despite the fact that said lands are properly posted with "No Trespassing, Vermilion Corporation" signs, showing the properties and canals to be subject to the exclusive possession of petitioner.

4.

All of the canals in question were built and have been maintained by either petitioner, its lessor, their predecessors, their agents, assigns or sublessees.

5.

Said trespass by defendant, Norman Vaughn, was willful and knowing on his part and occurred on several occasions and more particularly on or about June 26, 1975, in a canal at a point approximately one-fourth (1/4) of a mile North of Exxon Company Well No. 21, located in Section 26, Township 16 South, Range 1 West.

6.

Again, on or about July 18, 1975, defendant, Norman Vaughn, trespassed at a point approximately one-eighth (1/8) of a mile East of Exxon Company WEll No. 46, located in Section 29, Township 16 South, Range 1 East.

7.

Defendant again trespassed on or about September 14, 1975, at a point located between two bridges constructed across what

is known as the Humble Canal, located in Section 31, Township 16 South, Range 2 East.

8.

Defendant again trespassed on or about September 24, 1975, at a point approximately one-half (1/2) mile East of a cattle crossing on the Humble Canal located in Section 26, Township 16 South, Range 1 East.

9.

On each of said occasions, defendant, Norman Vaughn, was issued a warning and notice by Murphy Sellers, the Field Superintendent and Warden of petitioner in the presence of petitioner's employee, Earl Harden. Said Warning being given to defendant in the form of legal notices, copies of which are attached hereto and marked Exhibit "D", for identification.

10.

At the time of each trespass and at other times not herein specified, defendant has engaged in commercial fishing and/or shrimping in petitioner's canals resulting in the harvest of large catches of shrimp and fish of great value.

11.

Defendant's actions and defiance of ample warning has directly and indirectly encouraged others to trespass and engage in commercial fishing, all to plaintiff's detriment.

12.

Additionally, defendant has caused petitioner to suffer damages past, present and future, due to the illegal and

unauthorized fishing in a sum exceeding $ 250,000.00, all of which will be more accurately determined on the trial hereof.

13.

Despite the warnings given to defendant by the Warden, Murphy Sellers, the said Norman Vaughn continues to trespass and fish on the several canals subject to the control and possession of petitioner causing the damages enumerated.

14.

The defendant thus violated the rights of petitioner by his act of trespassing and petitioner is entitled to an injunction enjoining and prohibiting the said Norman Vaughn from trespassing on the property and canals within the property in control and possession of petitioner, pursuant to the above mentioned leases and for the damages in excess of $250,000.00, all of which is to be more fully shown at the trial hereof.

WHEREFORE, petitioner prays that the defendant be duly cited to appear and answer this petition and after due proceedings had, there be judgment herein in favor of petitioner Vermilion Corporation, and against the defendant, Norman Vaughn, decreeing the above acts of defendant to constitute a trespass of the rights of petitioner and enjoining, restraining and prohibiting Norman Vaughn from trespassing on any property and canals within the property of petitioner as described in the leases mentioned in paragraph 1 above, and further, that said defendant be assessed with all proven damages and costs of court.

And for all general and equitable relief, etc.

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
Attorneys for Petitioner
121 East St. Victor
P. O. Box 519
Abbeville, LA 70510
(318) 893-6766

PLEASE SERVE:

Norman Vaughn
Pecan Island Route, Box 86
Kaplan, Louisiana 70548

FILED 11/7 19 75

/s/ Roy James Hebert
Deputy Clerk of Court
Vermilion Parish, La.

A TRUE COPY
ATTEST:

/s/ Roy James Hebert
Deputy Clerk of Court
Vermilion Parish, La.

VERMILION CORPORATION

VERSUS

FREDDIE BROUSSARD

15TH JUDICIAL DISTRICT COURT

NUMBER: 36982 - E

VERMILION PARISH, LOUISIANA

PETITION FOR PERMANENT INJUNCTION
AND DAMAGES

The petition of VERMILION CORPORATION, corporation organized under the laws of the State of Delaware and authorized to do business in the State of Louisiana, with respect, represents that:

1.

Petitioner is the Lessee of and is in possession of certain lands in Vermilion Parish, Louisiana, which lands are fully described in the copy of the lease and amendments attached hereto and marked Exhibits "A", "B", and "C".

2.

Petitioner, pursuant to the terms and provisions of said lease and amendment, and under the authority therein granted is entitled to bring this action in the place and stead of the Lessor named in said lease and amendment, its successors or assigns.

3.

Freddie Broussard, a resident of Vermilion Parish, Louisiana, has without permission of your petitioner, trespassed on the lands of petitioner and more particularly in the private canals located within said lands, despite the fact that said lands are properly posted with "No Trespassing, Vermilion Corporation" signs, showing the properties and canals to be subject to the exclusive possession of petitioner.

4.

All of the canals in question were built and have been maintained by either petitioner, its lessor, their predecessors, their agents, assigns or sublessees.

5.

Said trespass by defendant, Freddie Broussard, was willful and knowing on his part and occurred on or about July 18, 1975, in a canal at a point designated as Humble Canal, Location No. 13, located in Section 33, Township 16 South, Range 1 East.

6.

On said occasion, defendant, Freddie Broussard, was issued a warning and notice by Murphy Sellers, the Field Superintendent and Warden of petitioner in the presence of petitioner's employee, Earl Harden. Said Warning being given to defendant in the form of a legal notice, a copy of which is attached hereto and marked Exhibit "D", for identification.

7.

At the time of said trespass defendant was engaged in commercial fishing and/or shrimping in petitioner's canals resulting in the harvest of large catches of shrimp and fish of great value.

8.

Defendant's actions and defiance of ample warning has directly and indirectly encouraged others to trespass and engage in commercial fishing, all to plaintiff's detriment.

9.

Additionally, defendant has caused petitioner to suffer damages past, present and future, due to the illegal and unauthorized fishing in a sum exceeding $250,000.00, all of which will be more accurately determined on the trial hereof.

10.

Despite the warnings given to defendant by the Warden, Murphy Sellers, the said Freddie Broussard continues to trespass and fish on the several canals subject to the control and possession of petitioner causing the damages enumerated.

11.

The defendant thus violated the rights of petitioner by his act of trespassing and petitioner is entitled to an injunction enjoining and prohibiting the said Freddie Broussard from trespassing on the property and canals within the property in control and possession of petitioner, pursuant to the above mentioned leases and for the damages in excess of $250,000.00, all of which is to be more fully shown at the trial hereof.

WHEREFORE, petitioner prays that the defendant be duly cited to appear and answer this petition and after due proceedings had, there be judgment herein in favor of petitioner Vermilion Corporation, and against the defendant, Freddie Broussard, decreeing the above acts of defendant to constitute a trespass of the rights of petitioner and enjoining, restraining and prohibiting Freddie Broussard from trespassing on any property and canals within the property of petitioner as described in the leases mentioned in paragraph 1 above, and further, that said defendant be assessed with all proven damages and costs of court.

And for all general and equitable relief, etc.

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER
121 East St. Victor
Post Office Box 519
Abbeville, Louisiana 70510

PLEASE SERVE:

Freddie Broussard
Pecan Island Route
Kaplan, Louisiana 70548

FILED 10 - 12 19 76

/s/ Clara F. Frederick
Deputy Clerk of Court
Vermilion Parish, La.

A TRUE COPY
ATTEST:

/s/ Clara F. Frederick
Deputy Clerk of Court
Vermilion Parish, La.

VERMILION CORPORATION

VERSUS

LARRY J. BROUSSARD

15TH JUDICIAL DISTRICT COURT

NUMBER: 36983

VERMILION PARISH, LOUISIANA

PETITION FOR PERMANENT INJUNCTION
AND DAMAGES

The petition of VERMILION CORPORATION, a corporation organized under the laws of the State of Delaware and authorized to do business in the State of Louisiana, with respect, represents that:

1.

Petitioner is the Lessee of and is in possession of certain lands in Vermilion Parish, Louisiana, which lands are fully described in the copy of the lease and amendments attached hereto and marked Exhibits "A", "B", and "C".

2.

Petitioner, pursuant to the terms and provisions of said lease and amendment, and under the authority therein granted is entitled to bring this action in the place and stead of the Lessor named in said lease and amendment, its successors or assigns.

3.

Larry J. Broussard, a resident of Vermilion Parish, Louisiana, has without permission of your petitioner, trespassed on the lands of petitioner and more particularly in the private canals located within said lands, despite the fact that said lands are properly posted with "No Trespassing, Vermilion Corporation" signs, showing the properties and canals to be subject to the exclusive possession of petitioner.

4.

All of the canals in question were built and have been maintained by either petitioner, its lessor, their predecessors, their agents, assigns or sublessees.

5.

Said trespass by defendant, Larry J. Broussard, was willful and knowing on his part and occurred on several occasions and more particularly on or about August 19, 1975, at a point designated as Location No. 22, located in Section 31, Township 16 South, Range 1 East.

6.

Again, on or about June 2, 1976, defendant, Larry J. Broussard, trespassed in a canal at a point designated as Well Location No. 21, located in Section 26, Township 16 South, Range 1 West.

7.

On each of said occasions, defendant, Larry J. Broussard, was issued a warning and notice by Murphy Sellers, the Field Superintendent and Warden of petitioner in the presence of

petitioner's employee, Earl Harden. Said Warning being given to defendant in the form of legal notices, copies of which are attached hereto and marked Exhibit "D", for identification.

8.

At the time of each trespass and at other times not herein specified, defendant has engaged in commercial fishing and/or shrimping in petitioner's canals resulting in the harvest of large catches of shrimp and fish of great value.

9.

Defendant's actions and defiance of ample warning has directly and indirectly encouraged others to trespass and engage in commercial fishing, all to plaintiff's detriment.

10.

Additionally, defendant has caused petitioner to suffer damages past, present and future, due to the illegal and unauthorized fishing in a sum exceeding $250,000.00, all of which will be more accurately determined on the trial hereof.

11.

Despite the warnings given to defendant by the Warden, Murphy Sellers, the said Larry J. Broussard continues to trespass and fish on the several canals subject to the control and possession of petitioner causing the damages enumerated.

12.

The defendant thus violated the rights of petitioner by his act of trespassing and petitioner is entitled to an injunction enjoining and prohibiting the said Larry J. Broussard from

trespassing on the property and canals within the property in control and possession of petitioner, pursuant to the above mentioned leases and for the damages in excess of $250,000.00, all of which is to be more fully shown at the trial hereof.

WHEREFORE, petitioner prays that the defendant be duly cited to appear and answer this petition and after due proceedings had, there be judgment herein in favor of petitioner Vermilion Corporation, and against the defendant, Larry J. Broussard, decreeing the above acts of defendant to constitute a trespass of the rights of petitioner and enjoining, restraining and prohibiting Larry J. Broussard from trespassing on any property and canals within the property of petitioner as described in the leases mentioned in paragraph 1 above, and and costs of court.

And for all general and equitable relief, etc.

COOPER & SONNIER

BY: _____

CHARLES R. SONNIER
121 East St. Victor
Post Office Box 519
Abbeville, Louisiana 70510

PLEASE SERVE:

Larry J. Broussard
Pecan Island Route
Kaplan, Louisiana 70548

A TRUE COPY
ATTEST:

/s/ Gladys R. Gaspard
Deputy Clerk of Court
Vermilion Parish, La.

FILED 10-12 19 76

/s/ Gladys R. Gaspard
Deputy Clerk of Court
Vermilion Parish, La.

EXHIBIT C (in globo)

VERMILION CORPORATION

VERSUS

NORMAN VAUGHN

15th JUDICIAL DISTRICT COURT

NUMBER: 35948

PARISH OF VERMILION, LOUISIANA

ANSWER

NOW COMES NORMAN VAUGHN, defendant herein, and for answer to plaintiff's petition, says that:

1.

Article 1 is denied for lack of sufficient information to justify a belief therein.

2.

Article 2 is denied.

3.

Article 3 is denied as written, Norman Vaughn further showing that the canals and other waterways referred to in this Article and at other points in plaintiff's petition are navigable waters, and navigable waters of the United States, and subject

to a paramount right of use for and on behalf of the public and citizens of the United States and are not subject to private ownership or control.

4.

Article 4 is denied for lack of sufficient information to justify a belief therein.

5.

Article 5 is denied as written.

6.

Article 6 is denied as written.

7.

Article 7 is denied as written.

8.

Article 8 is denied as written.

9.

Article 9 is admitted as to the facts alleged therein.

10.

Article 10 is denied as written.

11.

Article 11 is denied as written and denied for lack of sufficient information to justify a belief therein.

12.

Article 12 is denied.

13.

Article 13 is denied as written.

14.

Article 14 is denied.

15.

Plaintiff's acts in attempting to restrain use by petitioner of any canals or waterways mentioned herein, and plaintiff's act in filing and maintaining this lawsuit, are both prohibited by the Rivers and Harbors Act, 33 U.S.C. 401, et sequittur. in that such attempts by plaintiff constitute an obstruction to the navigable capacity of the navigable waters of the United States

16.

Apart from any such statutory violations, plaintiff's attempt to restrain or impair or prohibit, via lawsuit or otherwise, the use by plaintiff or any others of the canals or other bodies of water mentioned herein is unlawful due to the character of said waters as navigable waters of the United States not subject to private ownership or dominion, but instead burdened with a paramount easement of use in favor of the public. All waterways mentioned in this lawsuit are subject to tidal fluctuations

and/or are navigable in fact based upon their actual and potential uses as highways of commerce and fisheries.

17.

For the above reasons, plaintiff is without cause or right of action herein and has failed to state same in its petition. Plaintiff is also without cause or right of action as to its claim for damages based upon severance of shrimp and other fishes from its alleged private waters as, by specific provision of R.S. 56-311 and 312, said shrimp and fishes are not subject to private ownership, dominion or control.

WHEREFORE, defendant prays that this answer be deemed good and sufficient and after due delays and proceedings, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands with prejudice and at its cost.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing Answer has been mailed to counsel for plaintiff herein.

Lafayette, Louisiana, March 17, 1977.

/s/ John K. Hill, Jr.
JOHN K. HILL, JR.

VERMILION CORPORATION

VERSUS

FREDDIE BROUSSARD

15th JUDICIAL DISTRICT COURT

NUMBER: 36982 - E

VERMILION PARISH, LOUISIANA

ANSWER

NOW COMES FREDDIE BROUSSARD, and for answer to the petition of Plaintiff herein, says that:

1.

Article 1 is denied for lack of sufficient information to justify a belief therein.

2.

Article 2 is denied for lack of sufficient information to justify a belief therein.

3.

Article 3 is denied as written.

4.

Article 4 is denied for lack of sufficient information to justify a belief therein.

5.

Article 5 is denied as written.

6.

Article 6 is admitted as to the facts alleged therein.

7.

Article 7 is denied as written.

8.

Article 8 is denied as written, denied, and denied for lack of sufficient information to justify a belief therein.

9.

Article 9 is denied.

10.

Article 10 is denied as written.

11.

Article 11 is denied.

12.

Plaintiff's acts in attempting to restrain use by petitioner of any canals or waterways mentioned herein, and plaintiff's act in filing and maintaining this lawsuit, are both prohibited by the Rivers and Harbor Act, 33 U.S.C. 401, et sequittur, in that such attempts by plaintiff constitute an obstruction to the navigable capacity of the navigable waters of the United States.

13.

Apart from any such statutory violations, plaintiff's attempt to restrain or impair or prohibit, via lawsuit or otherwise, the use by plaintiff of any others of the canals or other bodies of water mentioned herein is unlawful due to the character of said waters as navigable waters of the United States not subject to private ownership or dominion, but instead burdened with a paramount easement of use in favor of the public. All waterways mentioned in this lawsuit are subject to tidal fluctuations and/or are navigable in fact based upon their actual and potential uses as highways of commerce and fisheries.

14.

For the above reasons, plaintiff is without cause or right of action herein and has failed to state same in its petition. Plaintiff is without cause or right of action as to its claim for damages based upon severance of shrimp and other fishes from its alleged private waters as, by specific provision of R.S. 56-311 and 312, said shrimp and fishes are not subject to private ownership, dominion or control.

WHEREFORE, defendant prays that this answer be deemed good and sufficient and after due delays and proceedings, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands with prejudice and at its cost.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502

VERMILION CORPORATION

VERSUS

LARRY J. BROUSSARD

15th JUDICIAL DISTRICT COURT

NUMBER: 36983

VERMILION PARISH, LOUISIANA

ANSWER

NOW COMES LARRY J. BROUSSARD, and for answer to the petition of plaintiff herein, says that:

1.

Article 1 is denied for lack of sufficient information to justify a belief therein.

2.

Article 2 is denied for lack of sufficient information to justify a belief therein.

3.

Article 3 is denied as written.

4.

Article 4 is denied for lack of sufficient information to justify a belief therein.

5.

Article 5 is denied as written.

6.

Article 6 is denied as written.

7.

Article 7 is admitted as to facts alleged therein.

8.

Article 8 is denied as written.

9.

Article 9 is denied for lack of sufficient information to justify a belief therein and denied as written.

10.

Article 10 is denied.

11.

Article 11 is denied as written.

12.

Article 12 is denied.

13.

Plaintiff's acts in attempting to restain use by petitioner of any canals or waterways mentioned herein, and plaintiff's act in filing and maintaining this lawsuit, are both prohibited by the Rivers and Harbors Act, 33 U.S.C. 401, et sequittur, in that such attempts by plaintiff constitute an obstruction to the navigable capacity of the navigable waters of the United States.

14.

Apart from any such statutory violations, plaintiff's attempt to restrain or impair or prohibit, via lawsuit or otherwise, the use by plaintiff or any others of the canals or other bodies of water mentioned herein is unlawful due to the character of said waters as navigable waters of the United States not subject to private ownership or dominion, but instead burdened with a paramount easement of use in favor of the public. All waterways mentioned in this lawsuit are subject to tidal fluctuations and/or are navigable in fact based upon their actual and potention uses as highways of commerce and fisheries.

15.

For the above reasons, plaintiff is without cause or right of action herein and has failed to state same in its petition. Plaintiff is without cause or right of action as to its claim for damages based upon severance of shrimp and other fishes from its alleged private waters as, by specific provision of R.S. 56-311 and 312, said shrimp and fishes are not subject to private ownership, dominion or control.

WHEREFORE, defendant prays that this answer be deemed good and sufficient and after due delays and proceedings, there be judgment herein in favor of defendant and against plaintiff, rejecting plaintiff's demands with prejudice and at its cost.

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502

EXHIBIT D (in globo)

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NOS. 6258, 6259, 6260

VERMILION CORPORATION

PLAINTIFF-APPELLEE

VERSUS

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD

DEFENDANTS-APPELLANTS

APPEALED FROM THE 15th JUDICIAL DISTRICT COURT, VERMILION PARISH, LOUISIANA, HONORABLE ALLEN M. BABINEAUX, PRESIDING JUDGE.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS, NORMAN VAUGHN, LARRY J. BROUSSARD and FREDDIE BROUSSARD

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502
(318) 233-7430)
COUNSEL FOR DEFENDANTS-APPELLANTS

[i]

[i]

SYLLABUS

I.

Summary Judgment must be used cautiously, is no substitute for trial, requires the resolving of all doubt concerning dispute as to issue of material fact in favor of trial on the merits, should be granted only when the mover is clearly entitled thereto, and must be denied if there is genuine issue of fact present, although the Court may feel that the party against whom the motion is brought has little chance to prevail at trial. LSA-C.C.P. Articles 966 through 969; *Laufer v. Touro Infirmary*, 324 So.2d 541; *Savoy v. Action Products Co.*, 324 So.2d 921, writ denied, 329 So.2d 463; *Rosen v. Capital City Press*, 314 So.2d 511.

II.

A body of water is "navigable water of the United States" if it is presently being used or is suitable for use for transportation and commerce, or if it has been so used or was suitable for such use in the past, or if it could be made suitable for such use in the future by reasonable improvements, the true criterion of navigability being the capability rather than manner and extent of use, and lack of commercial traffic being no bar to the conclusion that the waterway is navigable where personal and private use of boats demonstrates the availability of the waterway for the simpler types of commercial traffic; furthermore, the presence of tidal fluctuation in a body of water, and its opening onto or having access to the open sea, are criteria for determining whether or not it is "navigable water of the United States." *United States v. Cannon*, 363 F.Supp. 1045, District Court, Delaware, 1973; *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, D. C. Delaware, 1973; *United States v. Underwood*, 344 F.Supp. 486, Florida, 1972; *United States v. Stoeco Homes*, 498 F.2d 610; *United States v. Moretti*, 478 F.2d 428; and *United States v. Lewis*, 355 F.Supp. 1132.

[ii]

[ii]

III.

Under state law a private party may not obstruct passage of a highway of commerce, including a navigable waterway. LSA-R.S. 14:97; *Discon v. Saray*, 362 La. 997, 265 So.2d 765; *D'Albora v. Barcia*, 144 So.2d 911, La.App., 4th Cir. (1962).

IV.

Under federal law, a private party may not pose or place any obstruction, whether statutorily delineated or not, to the "navigable capacity" of the navigable water of the United States. 33 U.S.C. 403, *United States v. Republic Steel*, 80 S.Ct. 884.

V.

Manmade channels connecting with tidal water become navigable waters of the United States, notwithstanding that they are on private property and are developed with private funds. *United States v. Sexton Cove Estates*, 389 F.Supp. 602, affirmed in part, reversed in part, 526 F.2d 1293, D.C. Florida, 1976, and C.A., 5th Cir., 1976; *Tatum v. Blackstock*, 319 F.2d 397, 5th Cir., 1963.

VI.

"Navigable water of the United States" is not subject to private dominion or control, and the public has a servitude of navigation thereon. *United States v. Appalachian Elec. Power Co.*, 61 S.Ct. 291, 307-308 (1940); *United States v. Willow River Power Co.*, 65 S.Ct. 761, 766-767 (1945); *United States v. Twin City Power Co.*, 76 S.Ct. 259, 261-262 (1956); *United States v. 421.715 Acres, etc.*, 53 F.Supp. 143, 148, N.D.-Cal. (1943).

[iii]

[iii]

STATEMENT OF THE CASE

Vermilion Corporation, Lessee from Exxon Company of a large portion of the Louisiana Wetlands in Vermilion Parish (including lands from the Intracoastal Waterway on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre on the East to Rollover Bayou on the West) brought suit in Vermilion Parish against appellants Vaughn, Broussard and Broussard, alleging that appellants had "trespassed" on the plaintiff's leasehold via using plaintiff's canal system developed by plaintiff and its predecessors in title on the leasehold, and by fishing and shrimping therein, all without permission of the appellee.

Defendants answered, pleading in the main that these canals are "navigable waters of the United States", and that, under both federal and state law, the public has a paramount easement of use thereof, and that the canals are thus not subject to private dominion, ownership or control. The cases, being virtually identical, were consolidated.

Appellee filed a Motion for Summary Judgment in the Trial Court, and, in reasons filed on June 7, 1977, the Honorable Judge Babineaux granted the summary judgment, holding, in effect, that the canals on the leasehold are private, privately owned, and subject to private control. Judgment pursuant thereto was signed on 22 June 1977. Motion and Order for Appeal was signed on the same date, and this appeal was timely perfected.

The appeal of Judge Babineaux' granting of the Vermilion Corporation's Motion for Summary Judgment is thus before Your Honors.

[iv]

SPECIFICATIONS OF ERRORS

I.

The trial court erred in finding that there was no genuine issue of material fact, and in thus granting the Motion for Summary Judgment.

II.

The Trial Court erred in finding that the Vermilion Corporation was entitled to recover as a matter of law, insofar as the Trial Court held that, as a matter of law, the "Humble Canal System" constituted a system of private waterways, subject to the private ownership, dominion and control of Exxon and its Lessee, Vermilion Corporation.

[v]

ISSUES

I.

Was there genuine issue of material fact?

II.

Are the Humble Canals navigable in fact, and subject to tidal fluctuations?

III.

Are the Humble Canals "navigable waters of the United States?"

IV.

May a private party exercise ownership, dominion and control over navigable waters of the United States under either state or federal law, if those waterways were developed with private funds and are on private property?

[1] [1]

[1] ARGUMENT

MAY IT PLEASE THE COURT:

The three consolidated lawsuits which gave rise to this appeal were brought by the Vermilion Corporation in the 15th Judicial District Court for Vermilion Parish. Vermilion Corporation is the Lessee of certain lands in Vermilion Parish which are owned by Exxon Company, U.S.A. and which lands are delineated in Exhibits D1, D2 and D3 of the deposition of John Donohue, Chief Executive Officer of the Vermilion Corporation, which is a part of the record in this proceedings, and which was submitted both in support of and in opposition to the Motion for Summary Judgment filed below.

Generally speaking, these lands run from the Intracoastal Canal and Schooner Bayou on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre Canal on the East to Rollover Bayou on the West. Pecan Island is more or less in the center of the leasehold.

The Vermilion Corporation alleged in its pleadings that the defendants, by using certain canals dug and developed by the Vermilion Corporation and its ancestors in title on the leasehold, and by fishing and shrimping therein, "trespassed" on the lands of the Lessee. Appellee demanded injunctive relief against said trespass, and damages for the severance of shrimp by the appellants from its waterways.

Defendants answered and alleged principally as their defenses that they, as members of the public, had a paramount servitude or easement of use over and across these canals, as the canals are navigable in fact, are subject to tidal fluctuation, and are thus "navigable waters of the United States," which are not subject to private dominion or control regardless of the purpose, by whom, and where they were developed. Furthermore,

[1] [2]

both federal and state statutes prohibit the obstruction of the "navigable waters of the United States" and "highways of commerce." See 33 U.S.C. 403 and L.S.A.-R.S. 14:97.

[2] The Vermilion Corporation then filed a Motion for Summary Judgment, admitting the truth and validity of the majority of plaintiff's factual allegations. [1] Indeed, the only significant factual allegation made to date by appellants which Vermilion Corporation did not admit was that, in the development of the private canal system on the leasehold, Vermilion Corporation's ancestors in title had in fact impaired and virtually destroyed the navigability of natural navigable waterways [Fresh Water Bayou, for example] which prior to the development of the canal system had been used by residents of the Pecan Island area as actual and very vital highways of commerce. Vermilion Corporation presumably does not deny that Freah Water Bayou was formerly used as a highway of commerce; it simply denies that its actions had anything to do with rendering that Bayou unsuitable for such activity now.

Judge Babineaux, relying primarily on the opinion of this Court in *Audubon Society v. White*, 302 So.2d 660, erroneously, appellants submit, granted the Motion for Summary Judgment.

Appellants verily believe that, regardless of *Audubon Society v. White*, there was genuine issue of fact which should have precluded the granting of summary judgment.

Perhaps most important appellants also believe, to put it bluntly, that Your Honors' decision in *Audubon Society v. White* was and is erroneous, and flies squarely into the face of

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1 See pp. 6-7 for a recitation of the facts as to which the parties agree.

[2] [3]

the federal law in this area, which is both superior to state law by virtue of Article 1, Section 8, Clause 3 of the Constitution of the United States, and also is in wholesale disagreement in its jurisprudence with the principles set forth by this Court in *Audubon Society v. White.*

I.

SUMMARY JUDGMENT - WAS THERE GENUINE ISSUE OF FACT?

Before examining the substantive and truly important factual and legal considerations in this matter, one should first examine whether or not there was in any respect "genuine issue of material [3] fact" between the parties which should have been sufficient to preclude the Trial Court from the granting of summary judgment.

L.S.A.-C.C.P. Articles 966 through 969, and numerous cases; *Laufer v. Touro Infirmary*, 334 So.2d 541, *Savoy v. Action Products Co.*, 324 So.2d 921, and *Rosen v. Capital City Press*, 314 So.2d 511, dictate that the remedy of summary judgment must be used cautiously. It is no substitute for trial. It requires the resolution of all doubt concerning dispute as to issue of material fact in favor of trial on the merits. It can be granted only when the mover is clearly entitled thereto. Despite the feeling of the Court in any particular case that the party against whom a Motion for Summary Judgment is brought has little chance to prevail at trial, the motion simply must be denied if there is nevertheless "genuine issue of material fact" present in the lawsuit.

The Vermilion Corporation, through the deposition of its Chief Executive Officer, Mr. John Donohue, and through its representations to the Trial Court in brief and argument, admitted the validity of most of the factual allegations made by

[3] [4]

plaintiffs. But, as is quite evident from Mr. Donohue's deposition, particularly when same is compared with the affidavits of the appellants which were submitted in opposition to the Motion for Summary Judgment, there was one very large area of disagreement on the facts between the parties: The defendants claim, and believe they can prove at trial, that, at the time of and long before Humble et al began to develop canals in the affected area, there were *natural* waterways [particularly Fresh Water Bayou] which coursed from Pecan Island southerly to the Gulf of Mexico which were used by the denizens of Pecan Island as highways of commerce in the most literal sense–the U. S. Mail, cattle, groceries, and other stores were taken from and brought to Pecan Island by these natural navigable waterways. Defendants contend that the navigability of these natural navigable waterways, particularly Fresh Water Bayou, and another small body of water near the present DeWitt Canal and formerly called "Little Rollover" or "Little Fresh Water" Bayou, were impaired and virtually [4] destroyed *at the time of and as a direct result of* the development of the artificial canals by the then Humble Oil and Refining Company.

Even one of the cases cited by the Vermilion Corporation and by Judge Babineaux in support of summary judgment [*Ilhenny v. Broussard*, 135 So. 669] indicates that such evidence is an important consideration in a case of this type. Furthermore, LSA-R.S. 14:97 and 33 U.S.C. 403 may well have been violated, and may well have continued to be violated, by the builders of these artificial canals, if, at the very beginning of the development of the artificial canals, a natural navigable waterway was impaired or destroyed, and continues to be impaired or destroyed wholly or substantially as a result of the development of artificial navigable waterways.

To place this issue in its most salient light, proof by the defendants that Fresh Water Bayou's navigability was impaired or destroyed only by the development of Humble's, thence

Exxon's, thence Vermilion Corporation's private canals, would mean not merely that the plaintiff-appellee had developed *ab initio* artificial navigable waterways, which *became* "navigable waters of the United States," but actually *substituted artificial* navigable waterways for a *pre-existing natural* system of navigable waterways. If that were true, certainly under no circumstances could the mere passage of time bestow upon the plaintiff's artificial navigable waterways the status of "private property."

Judge Babineaux seemed frankly to feel that this strongly contested factual issue between the parties had nothing to do with his decision in this case. Appellants believe it did as a matter of federal and state statutory law, and further as a factor which strongly distinguished [1] the present case from *Audubon Society v. White*, assuming arguendo for the moment that *Audubon Society v. White* was a correct decision on its own facts.

Furthermore, although the writer and counsel for the Vermilion Corporation, due to their basically pleasant and [5] cooperative natures, were able early on to agree substantially as to many of the important facts in this matter, one should also note as a general proposition that this litigation is simply too important to be decided based upon one deposition, an affidavit, two sets of pleadings, and that which counsel for the parties informally advised the Court as to the nature of the facts. One speaks in this case of a violation clash between two very powerful principles: On the one hand, there is the sanctity of private property; on the other, the equally sacrosanct and equally ancient principle of the public right of navigation of marine highways of commerce.

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1 See discussion of this distinguishing factor at p. 10.

The Louisiana wetlands are crossed and paraphed with many artificial canal systems. It would probably come as a great shock to the developers of some of those canal systems that they are "navigable waters of the United States" subject to a public right of navigation. It would also come as a great shock to the members of the public who exercise that right of navigation to be told that these canals are "private property." The reason both sides would be so shocked is that there simply has not been a lot of thinking and effort devoted in our state to this clash of interests. With the exception of a few cases, the interests have simply coexisted - neither has bothered the other in many areas, while both probably confidently felt that either could tell the other at any given time "where to get off."

The exact configuration and unitariness of the Humble Canal System involved in this litigation, and certainly the exact history, geography and hydrography present in the areas involved in this litigation, might dictate a result different from that which on the surface would seem to be an identical situation in another area of our state, but which, upon delving into all the facts, would be distinguishable. Do not all of us in this case, judges and counsel for the parties, owe to ourselves and to our judicial institution a full development of all facts thought to be relevant, so that a definitive decision can be reached? [6] Stated differently, is not this case simply too important to be decided via Motion for Summary Judgment?

In summary, there was "genuine issue of material fact" discernible even at the early stage of development of this case at which Judge Babineaux considered the Motion for Summary Judgment. The issue of fact concerning the *natural* navigable waterway history of the area, plus the alleged impairment or destruction thereof via the development by plaintiff's ancestors of its artificial waterway system, was enough in and of itself to preclude Judge Babineaux' granting summary judgment. On a less technical, but ultimately more important, basis, Appellants

also believe that this case generally is simply too big, too complex, and too important to many persons and interests in the State of Louisiana to have been decided by the Trial Court via summary judgment, and on the basis of the small amount of material which was before the Court at that time.

II.

WAS THE VERMILION CORPORATION ENTITLED TO RECOVER AS A MATTER OF LAW - MAY A PRIVATE CANAL, DEVELOPED ON "PRIVATE PROPERTY, WITH "PRIVATE" FUNDS, BECOME "NAVIGABLE WATER OF THE UNITED STATES," THUS TO PRECLUDE PRIVATE CONTROL AND DOMINION, AND THUS TO GIVE THE PUBLIC AN EASEMENT OF USE?

The following recitation includes all or virtually all of the factual background of this litigation on which the parties are literally in agreement:

As Mr. Donohue's deposition shows, at various times from the early 1940s to the present, the Vermilion Corporation and its ancestors or allied corporations [Louisiana Fur Company, Humble Oil and Refining Company, and Exxon Company, U.S.A.], have built canals on the leasehold. The canal system is unitary; i.e., no part of it is enclosed on both ends of any particular waterway, and the canal system generally speaking connects at the four points of the compass with what are unquestionably navigable waters of the United States, to-wit: The Gulf of Mexico, Fresh [7] Water Bayou Canal, the Intracoastal Waterway, etc. The canal system generally was built to specifications of channels approximately 60 feet wide and 8 feet deep - some more, and some less, but the average width and depth are as aforesaid. The entire unitary canal system of course was built on private property with private funds. But, more important, the entire canal system is clearly

subject to tidal fluctuation, and is clearly navigable in fact. All parties agree on these conclusions.

Dredges, drilling barges, work boats, cargo boats, pleasure boats, pirogues, shrimp and fishing boats, and the proud vessels used by many members of the South Louisiana bench and bar during hunting season, now ply, and for many years have plied, the waters of these canals. As is evident from Mr. John Donohue's deposition, there are now and have been for many years, two commercial marinas at different points on the Northern headwaters of the canal system–Hazel's Landing and Broussard's Landing have long served Humble and Exxon, fishermen and hunters, and those who desired simply to have a place to launch their boats, navigate a few miles and thence debouch into the Gulf of Mexico.

A body of water is "navigable water of the United States" it is is presently being used or is suitable for use for transportation and commerce, or if it has been so used or was suitable for such use in the past, or if it could be made suitable for such use in the future by reasonable improvements, the true criterion of navigability being the capability rather than manner and extent of use, and lack of commercial traffic being no bar to the conclusion that the waterway is navigable where personal and private use of boats demonstrates the availability of the waterway for the simpler types of commercial traffic; furthermore, the presence of tidal fluctuation in a body of water, and its opening onto or having access to the open sea, are criteria for determining whether or not it is "navigable water of the United States." *United States v. Cannon*, 363 F.Supp. 1045. District Court, Delaware, 1973; *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, D. C. Delaware, 1973; *United States v. Underwood*, 344 F.Supp. 486.

[8] Thus, Humble Canal System is:

(a) Unitary;

(b) Connects on its North, East and South sides with obvious navigable waterways [Intracoastal Canal, Fresh Water Canal, and the Gulf of Mexico];

(c) Rises and falls with the tides;

(d) Is "navigable in fact," and

(e) Is thus, by anyone's definition, "navigable water of the United States."

Yet, Appellants, as citizens and members of the public, were told by the Trial Court that they cannot use those waterways without the permission of their "private owner." An analysis of the reasons for the decision of the Court below will, Appellants submit, show how and why the Trial Court erred it its appreciation of the law.

Judge Babineaux relied upon this very Court's decision in *Audubon Society v. White*, 302 So.2d 660, and also to a certain extent upon *Ilhenny v. Broussard*, 135 So.2d 609, and went on to say:

> "To support their position that the impairment of the navigability of a natural water is an issue material to this case, the defendant cites *Ilhenny v. Broussard*, 135 So. 609 (Sup. Ct. 1931). Although the Court in that case does note that there is 'some authority' for the proposition that the public is entitled to the use of a new canal which obstructs a navigable waterway, it ultimately rejects that authority, and denies the defendant the right to use a privately built canal.

> "The facts this Court feels are important are that the canals were constructed with private funds on private property; that the canals have been maintained privately and the use thereof has been restricted use with permission only; and, there are numerous trespass signs indicating the private nature of the canals involved.
>
> [9] "We distinguish *D'Albara v. Garcia*, 144 So.2d 911, and *Discon v. Saray*, 265 So.2d 765, as did the Third Circuit in *National Audubon Society v. White*, 302 So. 765 660, by noting that those cases found that the waterways involved were either part of the public domain or had been dedicated for the public use. In the case at hand we find the canals are privately maintained and have not been dedicated for the public use.
>
> "We find that the Third Circuit's statement of the law in *National Audubon Society v. White* and the Supreme Court's decision in *Ilhenny v. Broussard* are controlling; and even taking the allegations of defendant, that the canals have obstructed or diverted 'navigable waters of the United States' we must conclude that navigable waterway constructed with private funds on private land is a private thing and not open for public use." (Emphasis and underscoring theirs)

With apologies to Judges Hood, Culpepper and Miller, Appellants believe that *Audubon Society v. White* is simply an erroneous decision in all respects, as it stands for a proposition which Appellants believe cannot be countenanced under the Constitution and laws of the United States. *Audubon* seems to say that a waterway can be "navigable," and presumably can be "navigable waters of the United States," but if developed on

private property with private funds, is nevertheless subject to private dominion and control. Perhaps the writer is simply unaware of the law applicable to this matter, but, again with apologies to the *Audubon* Judges, the writer believes that they created in *Audubon Society v. White* an anomalous legal status via the attempted marriage of two mutually exclusive legal principles: There is no *private* "navigable water of the United States" as the writer appreciates the law; private dominion and control simply cannot be married to the public right of use of "navigable water of the United States."

A reading of *Audubon* shows, Appellants believe, that the real issues which should have been litigated by the parties in the Trial Court and which should have been dealt with by the Appellate Court were not addressed. *Audubon* was tried as if it were a road dedication case. No one raised apparently the many issues of federal law applicable to waterways which do not apply [10] to questions and cases involving dedications of roads, and of normal rights of way over land.

Furthermore, Your Honors will note that, at Page 662 of the *Audubon* opinion, the Court said:

> "The canal has been . . . widened since it was originally built, and it is now from 88-110 feet wide, and 9 to 11 feet deep. It is navigable and has been navigable since it was first built in 1912. *There were no navigable waters on the land affected by the canal before that waterway was constructed.*" Ibid. [Emphasis supplied].

One should remember that in this case, the one large factual issue in dispute between the parties concerns the pre-existence of natural navigable waterways on the Vermilion Corporation's leasehold and the impairment or destruction thereof via the building of the artificial canal system. Presumably, this Court

felt that the absence of such an issue, or of such proof, in the *Audubon* case was important. Presumably, also, if Appellants are able to prove at a trial on the merits of the instant case that the artificial canal system presently in question was born itself only via destruction of a natural system of navigable waterways, the result, even under the authority of the *Audubon* case - even if it is correct - might well be different. Appellants will leave that distinguishing factor to Your Honors own consideration, for Appellants desire to concentrate on that which they really believe to be wrong with the *Audubon* case, and right about their position in the instant litigation.

The fact that the Humble Canal system involved in this case was developed on private property with private funds is, Appellants believe, of no moment, for the law both of the State of Louisiana and of the United States shows that, even though manmade channels and canals be constructed on private property with private funds, if they then or thereby become navigable, and otherwise connect with clearly navigable bodies of water, they become "navigable waters of the United States," and, pursuant to provisions of the United States Constitution, U. S. and [11] Louisiana jurisprudence, and statutory authority, they become public highways of commerce, not subject to private dominion or control and instead open to public use.

The United States has paramount control over navigable waters under the Commerce Clause of the Constitution of the United States (Article 1, Section 8, Clause 3). The dispositive effect of this principle upon this case is discussed *infra*, but, before doing so, the Court should be aware of the following principles:

(a) Under state law, a private party may not obstruct passage on a "highway of commerce" (R.S. 14:97);

(b) Under federal law, a private party may not pose or place *any* obstruction (whether statutorily delineated or not) to the "navigable capacity" of the navigable waters of the United States (33 U.S.C. 403, and *United States v. Republic Steel*, 80 S.Ct. 884).

(c) Fishes and shrimp are not subject to private ownership or control (R.S. 56:311-312);

(d) Most important, the federal law, as is indicated in the *Sexton* case, and the state law, as was indicated by our Supreme Court in *Discon v. Saray*, [1] stand clearly for the proposition that, although a canal be developed with private funds on private property, if these canals be navigable in fact or subject to tidal fluctuation, and otherwise connect with that which is undisputed navigable water of the United States, "these canals themselves become navigable waters of the United States." *United States v. Sexton Cove Estates*, 389 F.Supp. 602, affirmed in part, reversed in part, 526 F.2d 1293, D.C.Florida, 1976, and C.A. 5th Cir. 197_

In *Discon v. Saray*, the Court discussed the facts and some of the law applicable to this matter in the following language:

> [12] "Plaintiffs urge that the obstruction of navigable waterways is reprobated by R.S. 14:97 [2] and

---

1 See also the older *D'Albora v. Garcia*, 144 So.2d 911

2/ "Simple obstruction of a highway of commerce is the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, naviable waterway, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult.

"Whoever commits the crime of simple obstruction of a highway of commerce shall be fined not more than two hundred dollars, or imprisoned for not more than six months, or both.

> that under this provision, as applied by the Court of Appeal, Fourth Circuit, in D'Albara v. Garcia, La. App., 144 So.2d 911 (1962), cert. den., to another canal bordering Lake Pontchartrain, the action of the defendant is prohibited.
>
> "The Court of Appeal found that Faciane Canal is a navigable waterway, and that the defendant owns that part of the waterway running through his property. It held, however, the right of the plaintiffs to use the waterway constituted merely a servitude of passage which, under the provisions of Civil Code Arts. 703 and 777, may be changed to another location by the owner of the servient estate: and that, since the defendant has offered for the use of plaintiffs another, different canal by which they will have navigational access through his property, he has satisfied the provisions of the cited Civil Code articles. For these reasons, it concluded that plaintiffs were without right to maintain their action to prevent defendant from closing Faciane Canal where it goes through his property in order to give him a better utilization of his land.
>
> "We understand from the record that Faciane Canal was constructed in the mid-1950's. It was included in a subdivision development known as the North Shore Beach Subdivision. The 168 lots therein (each 100 feet in width) lie along the edge of Lake Pontchartrain. The Canal and a road designated as Carr Drive are shown on the subdivision plat to the rear of the lots and roughly parallel to the shore of the lake. The Canal and roadway are approximately three and one-half miles long. Access to the lake is available through only one end of the canal, the other end running into the Southern Railway tracks.

"The defendant owns the property on both sides of the canal where the canal enters the lake, and desires to fill in the canal at that point for almost 700 feet, in order to have [13] direct access to his property on each side. For convenience we attach hereto that portion of the subdivision plat (a survey conducted by F.C. Gandolfo, Jr., dated September 23, 1954), which shows the area where the canal enters the lake and where defendant proposed to close the canal. The part of the canal between the 'x's' (which we have placed on the plat) is the area where the witnesses at the hearing estimated that the closure was attempted.

"We entertain no doubt but that the lower courts were correct in their conclusion that the canal is navigable. It is fifty to sixty feet wide, and wider in some areas. Witnesses estimated its depth as being between ten to fifteen feet. Boats up to thirty or thirty-five feet in length regularly use the canal and larger boats have used it from time to time. Principally these boats belong to the owners of the abutting property and are used for pleasure purposes. However, floating pile drivers and barges have also been in the canal in connection with the construction of boat houses and piers. Indeed, it appears to be conceded in defendant's brief that the canal is navigable in fact. However, defense counsel argue that it is not navigable in law because there is no commercial traffic thereon, and that since the abutting property is restricted to residential use there will be no commercial use of the canal.

"We find that the record does not bear out this contention. As shown, the canal has been used by commercial floating pile-drivers and barges. And that part of the canal abutting the defendant's property,

which is commercially zoned, has been used commercially as a rented dock for crew boats used in oil operations. (The first six lots which are owned by defendant are zoned for commercial purposes.)

"In any event we think that the court in D'Albora v. Garcia, supra, correctly stated that:

' *** the capability of use by the public for purposes of transportation and commerce affords the true criterion of navigability rather than the extent and manner of use. Economy Light & Power Co. v. United States, 256 U.S. 113, 122, 123, 41 S.Ct. 409, 412, 65 L.Ed 847; United States v. The Montello, Etc., 20 Wall. 430, 22 L.Ed. 391. Nor, as was pointed out in United States v. Appalachian Electric Power Co., 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243, does the lack of commercial traffic preclude a conclusion of navigability where personal or private use by boats demonstrates the navigability of the stream for a type of commercial navigation. * * *

'It was particularly pointed out in the United States v. Appalachian Electric Power Co. case, supra, that the condition of exploration and settlement of an area explained the infrequency or limited nature of such use of waters as highways of commerce, and that the lack of commercial traffic does not preclude the [14] conclusion that a body of water is navigable where personal or private use demonstrates the capability of the stream for a type of commercial navigation; the question of the availability of the body for navigation is controlling rather than the extent of commerce conducted thereon. A similar observation was made by the Louisiana Supreme Court in State v. Jefferson Island Salt Mining Co., supra.'

[14]

"Inasmuch as we have found that the canal is navigable on the basis of other evidence, we do not deem it necessary that it be determined whether it is subject to tidal e-b and flow (which concededly is one indicia of navigability). But because of defense counsel's heavy reliance on this factor as distinguishing this case from D'Albora, we have examined the record to find whether it sustains their assertion that, unlike the canal in D'Albora, the Faciane Canal is not affected by a regular ebb and flow of the astronomical tides (as distinghished from the wind tides). The meteorologist who testified for defendant on this point did not testify that the *Faciane Canal*, as distinguished from Lake Pontchartrain, is not so affected, he testified that none of *Lake Pontchartrain* is subject to an atmospheric or astronomical tide. He did state, however, that if tide is considered as an ebb and flow that then there was an ebb and flow in the lake. He haye no testimony in this regard applying specifically to the canal. On the other hand, witnesses who have spent considerable time on the canal testified that there is a daily ebb and flow in the canal of eight to ten inches. In other words, the canal *is* affected by an ebb and flow in the same manner as is the lake and in the same fashion as the canal involved in D'Albora.

"Hence, because the canal is navigable, there can be no question but that it is subject to the provision of R.S. 14:97.

"Manifestly, the complete blockage of the canal by defendant where it passes his property not only renders 'movement thereon more difficult,' (R.S. 14:97), it renders movement thereon impossible." [Emphasis theirs]. 265 So.2d 765, 767-770.

[15]

In *United States v. Sexton Cove Estates, supra*, the following language may be found:

"In the case at bar, the defendants' canals denoted as numbers one (1) through five (5) are tidal and are connected to Blackwater Sound, a navigable water of the United States. The five unopened canals also have tidal fluctuations. Thus, these canals affect the nearby navigable waters; i.e. waters of Blackwater Sound are diverted into the canal systems with the tidal fluctuations and (anoxic, polluted) waters from the canal system are returned to Blackwater Sound; any of these alter or modify the course, location, condition or capacity of Blackwater Sound as a matter of law:

[15] *Any excavation or filling operation must necessarily 'alter' or 'modify' the body of water which is its subject.* United States v. Benton and Company, Inc., 345 F.Supp. 1101, 1102 (M.D. of Fla. 1972). (Emphasis added).

"The Fifth Circuit in Tatum v. Blackstock, *supra*, also holds clearly that man-made channels connecting with tidal waters become navigable waters of the United States notwithstanding that they are on private property. The Court stated:

" . . . At the point where plaintiff's property and other property in the subdivision join this low tidal flat, a *man made channel* has been dug running from the channel of Taylor Bayou on the west in an easterly direction ane forming the south and east boundaries of the tidal flat, connecting with Taylor Lake. Thus the area is now completely surrounded by navigable water and in effect what was a peninsula is

> now rendered an island by the cutting of the *man made channel, and the channel is navigable water of the United States.* Tatum v. Blackstock, Id., 319 F.2d at 398." (Emphasis theirs).
>
> *United States v. Sexton Cove Estates,* 389 F.Supp. 602, page 607.

That which is "navigable water of the United States," under the authority of a legion of federal cases, is not subject to private dominion or control, as the public has a paramount right of use therein. *United States v. Appalachian Elec. Power Co.*, 61 S.Ct. 291, 307-308 (1940); *United States v. Willow River Power Co.*, 65 S.Ct. 761,766-767 (1945); *United States v. Twin City Power Co.*, 76 S.Ct. 259, 261-262 (1956); *United States v. 421.715 Acres, etc.*, 53 F.Supp. 143, 148, N.D.-Cal. (1943). In *United States v. 412.715 Acres, supra,* it was said succinctly

> "It is well established that title to the banks and bed of a navigable stream are subject to the navigation servitude. The nature of the servitude is defined by cases cited in the Government's brief: 'The public right of navigation'. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 33 S.Ct.679, 57 L.Ed. 1083; Scranton v. Wheeler, 179 U.S.141, 21 S.Ct. 48, 45 L.Ed.126; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 S.Ct.667, 57 L.Ed. 1063. The shores and lands lying under navigable waters are held to be subject to a trust for the public uses of navigation and fishery. Being subject to this trust, they were publici juris; in other words, they were held for the use of the people at large. Stockton, Atty. Gen. of New Jersey, v. Baltimore & N.Y.R. Co., C.C., 32 F.9. A waterway was designated the 'greatest public utility' in Hawkins Point Light-House Case,

> C.C., 39 F.77,88. [16] The court in that case also said that 'The bed of a navigable river remains subject to an easement of navigation.' In controlling, improving and regulating the navigability of waters the Government traditionally acts for the benefit of the navigating public. Unquestionably, it may deepen channels, widen streams, erect and make similar improvements, without compensating the owners of land subject to the navigation servitude."

The writer frankly finds it very difficult to see how, *Tatum, Sexton Cove Estates,* and the immediately foregoing quotation can simply be ignored by the courts of our state. All of us know that commerce, navigation, and the admiralty are in the end peculiarly the province of the United States, and not of the states. That is no new or revolutionary principle. Furthermore, 33 U.S.C. 403, which prohibits "obstruction to the navigable capacity" of navigable waters of the United States, and the line of jurisprudence reflected in *Tatum* and *Sexton Cove Estates* are also not new or revolutionary.

We hope that this Court will agree with and recognize the error which we feel was made by this Court in *Audubon* and perpetuated by Judge Babineaux: The concept of "dedication to public use" is a creature of state law as applied to landslide roads. The federal, and, in the main, our state jurisprudence, simply cannot and does not speak of waterways in the same frame of reference. *D'Albora v. Garcia,* 144 So.2d 911 and *Discon v. Saray, supra,* certainly mention "dedication to public use," whether it be by subdivision plat or otherwise, but they also prominently mention the much more and truly important legal principles which were involved in both of those cases and which should have been involved in *Audubon*: Once one proves navigability in fact and navigability in law, that ends the inquiry with regard to waterways; one does not have to, and should not be required to, go beyond that point and prove some sort of "dedication."

It makes not a whit of difference that Mr. Donohue and others have put up "No Trespassing" signs, and have not "dedicated" their canals to public use. *The fact that Vermilion* [17] *Corporation and its ancestors in title built navigable canals, and tied those canals into other clearly navigable bodies of water made those canals from the day of their completion "navigable water of the United States," and neither the Vermilion Corporation nor anyone else, save the government of the United States by its laws, can tell a member of the public that he or she may not navigate those canals.*

We hope that this Court will not only reverse the judgment of the Trial Court, but will indicate clearly and strongly in this opinion the applicable legal principles which must govern this matter, and we further hope that the Court will agree with the undersigned that those principles are as set forth in 33 U.S.C. 403, LSA-R.S. 14:97, *Discon v. Saray, D'Albora v. Garcia*, and, most important, *United States v. Sexton Cove Estates* and *Tatum v. Blackstock.*

Respectfully submitted,

MOUTON, ROY, CARMOUCHE, HAILEY, BIVINS & MCNAMARA

BY: /s/ John Hill
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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum has been duly mailed to counsel for Plaintiff-Appellee, Mr. Charles R. Sonnier, P.O. Box 519, Abbeville, Louisiana 70510.

Lafayette, Louisiana, August 8, 1977.

/s/ John Hill
JOHN K. HILL, JR.

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NOS. 6258, 6259, 6260

VERMILION CORPORATION

PLAINTIFF-APPELLEE

VERSUS

NORMAN VAUGHN, FREDDIE BROUSSARD
AND LARRY J. BROUSSARD

DEFENDANTS-APPELLANTS

APPEALED FROM THE 15TH JUDICIAL DISTRICT COURT, VERMILION PARISH, LOUISIANA, HONORABLE ALLEN M. BABINEAUX, PRESIDING JUDGE.

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE VERMILION CORPORATION

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SYLLABUS

I.

The plaintiff may move for a summary judgment in his favor for all or part of the relief for which he has prayed, with supporting affidavits, at any time after the answer has been filed. The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue as to material fact and that mover is entitled to a judgment as a matter of law. L.S.A.-C.C.P. Article 966-969.

II.

A canal built entirely on private property, with private funds and for private purposes, is a private thing, for the same reasons that a road built on private property for private purposes is a privately owned road, regardless of whether or not the canal is navigable, and despite the fact that there may be a natural tide in the canals. The owners therefore have the right to regulate and control the use of the canals, including the right to prohibit defendants from using it. *National Audubon Society v. White*, 302 So.2d 660, 3rd Cir., 1974. *Ilhenny v. Broussard*, 135 So. 669, Sup. Ct., 1931. *Harvey v. Potter*, 19 La. Ann. 264, Sup. Ct., 1867.

[1]

[1]

STATEMENTS OF FACTS

Appellee is the lessee of and is in possession and control of certain lands in Vermilion Parish, Louisiana, described in Exhibits "A", "B", and "C" attached to the original petition which is filed in the record. (Maps showing the property are attached to the deposition of John Donohue, which is also part of the record of these proceedings.) There are numerous canals on the property which are used as the primary means of transportation from one point to another within appellee's leasehold. They are also used by sub-lessees and other persons with written permits from appellee.

These canals were constructed by the present owner and its ancestors in title, exclusively with private funds. Since the canals were built, their use has been continuously supervised and controlled by appellee, and by appellee's lessor and its ancestors in title. There are numerous "No Trespassing" signs posted alongside the canals throughout the entire leasehold. Appellee has subleased almost all of the property to duck hunters, commercial fishermen, trappers, and others, through written leases and hunting permits. The right to use the canals is granted with the sublease.

The appellants have on repeated occasions and after due warnings from appellee and its employees, engaged in commercial fishing and/or shrimping activities on the canals within appellee's lease, without permission of appellee. (See the affidavit of Warden Murphy Sellers which is filed in the record.) Appellants do not contest the fact that they were in the locations as alleged in the original petition. However, appellants do contest appellee's right to prohibit them from engaging in commercial fishing and/or shrimping, or otherwise using said canals within appellee's leasehold.

[1] [2]

Appellants admit that the canals are wholly upon private property, and were constructed exclusively with private funds. It is not contested that appellee has maintained control of the use [2] of those canals continuously for many years, has maintained a multitude of "No Trespassing" signs posted along the canals throughout appellee's leasehold, and has granted permits to many hunters, fishermen, and other sportsmen to use the canals.

Appellants are correct in stating that many proud vessels used by members of the Louisiana Bench and Bar during hunting season have "plied" the waters of these canals, however they failed to mention that no plying was done without a permit from appellee. When what is known as the Freshwater Bayou was widened and improved, the U. S. Corps of Engineers secured a servitude from appellee and from the owners of the property.

On the other hand, appellee admits readily that the canals are capable of being navigated for certain uses, and are subject to the tides to some degree. Therefore, as alleged in the motion for summary judgment, there are no real material questions of fact presented in these law suits. Rather the issue is whether or not appellee has the legal right to continue to control the canals within its lease.

These three consolidated suits were filed by appellee, Vermilion Corporation, requesting injunctions to restrain and prohibit defendants, Norman Vaughn, Freddie Broussard, and Larry J. Broussard from trespassing on any and all property and/or private canals under lease to appellee.

Appellants first removed the three suits to Federal Court, but they were remanded to the Fifteenth Judicial District, Parish of Vermilion after the Federal Court failed to find that the suits presented a Federal question. The defendants then

[2] [3]

filed a separate suit in Federal Court against appellee requesting an injunction which would stay the State Court proceedings. Those suits have been dismissed voluntarily by appellants.

Appellee filed a motion for summary judgment on the request for an injunction against the three defendants, together with affidavits of Murphy Sellers, a Vermilion Corporation Warden, and John Donohue, an officer of the corporation. Mr. Donohue's [3] deposition was also included. The trial court found that there were no genuine issues of material fact, and rendered summary judgment granting appellee the injunction requested.

[4] ARGUMENTS AND LAW

MAY IT PLEASE THE COURT:

Appellants listed in their specification of errors two principal contentions, which are the main issues to be decided on this appeal. Appellants first claim that the trial court erred in finding that there was no genuine issue of material fact. Secondly, appellants argue that the trial court erred in finding that appellee's canal system constitutes a system of private waterways, subject to private ownership, dominion and control.

Appellee and appellants are in general agreement as to the facts that are genuinely material to this case and upon which a judgment can be rendered. It is clear then that the canals in question were built exclusively on private property and with private funds. Appellee has been in control and has continuously supervised the canals since they were built. The canals are navigable and are subject to the tides to some degree. It is also not contested that the appellants did in fact engage in commercial fishing and/or shrimping activities in said canals without permission. Appellee contends that these are all the material facts which the trial court needed to render its judgment.

Even appellants in their brief admit that the facts are not disputed. Appellants stated in page two of their brief that the only significant allegation made by appellants which is not fully agreed to is appellants' claim that the initial construction of the canals over thirty years ago impaired previously existing natural waterways. The court should note that this "factual allegation" was not specifically pleaded as an affirmative defense in the answers filed by appellants.

Appellee has maintained the position in the trial court, and continues to maintain the position that even if this allegation were proven, it is not material to the outcome of this lawsuit,

and therefore the trial court was correct in making its decision.

[5] Appellants in their brief did not cite any authority supporting their claim that if previously existing natural waterways were affected, the owner of private canals loses his ownership or control. Thus, none of the law cited in brief indicates that the allegation is material or that it would affect the outcome of this lawsuit.

Appellants state that the Supreme Court opinion in *Ilhenny v. Broussard*, 135 So., 669 indicates that such evidence is an important consideration in a case of this type. Appellees respectfully disagree. The *Ilhenny* case also involves the right of private property owners to the ownership and control of navigable canals built with their own private funds. In that case the Supreme Court of Louisiana ruled that although the Congress of the United States may have plenary power over navigable waters of the nation, privately built canals are still subject to private ownership and control. The defendant in the *Ilhenny* case made much ado about its allegation that the privately built canal diverted water from natural channels. The Court, in its opinion stated:

> "On this testimony we are unable to say that defendant has shown, by a preponderance of the testimony, either that the natural channel is no longer navigable or that (if no longer navigable) this condition is due solely to the waters being diverted by the canal.
>
> "*But be that as it may we do not think this gives defendant the right to use the plaintiff's private canal.*" (Emphasis added.)

The court made it clear that even if the allegation were true, it does not affect the canal owners right to own and control his

[5] [6]

private canal, and thus the allegation was not material to the legal issues presented in that lawsuit. The Supreme Court concluded:

> "On the whole, therefore, we are of the opinion that defendant has not the right to use plaintiff's canal *under any circumstances* . . ." (Emphasis added.)

[6] Appellee therefore contends that even if this allegation were true, (and it was clearly admitted in appellants' brief that this was the only factual allegation not agreed to), it is still not material to the issues involved in this lawsuit. The Third Circuit discussed the *Ilhenny* case in its decision in *National Audubon Society v. White*, 302 So.2d 660, 1974 when it stated:

> "In that case E. A. McIlhenny, plaintiff's ancestor in title, sued defendant, Broussard to enjoin him from using that canal. The principal defense urged by the defendant was that the McIlhenny canal diverted so much water from the natural channel that the latter was no longer navigable, and that defendant thus had a right to use plaintiff's canal (even though a private one) because of having been deprived of the use of the natural channel. *The court held that regardless of whether the McIlhenny canal diverted waters from another channel, as contended by defendant, defendant nevertheless did not have the right to use plaintiff's private canal.*" (Emphasis added.)

Judge Babineaux correctly read and interpreted the above cited cases, and was correct in his decision that the only factual allegation which has not been agreed to was not material to his decision in this case. It would have been senseless to require the time and expense of a full trial on the merits merely to determine the truth of one factual allegation that was not material to the lawsuit.

[6] [7]

Appellants' final argument in support of their specification of error number one, is that this litigation is "too important" to be decided upon on summary judgment. This claim is obviously without merit. Appellants cited no authority which states that "important" decisions can't be made through summary judgment, nor have appellants outlined a system for measuring the relative importance of different cases.

The very purpose of a trial is to bring the facts before the court. Our Code of Civil Procedure recognizes that there are many instances when the parties are in agreement as to the material facts, but simply disagree as to what law should be applied to these facts. In those cases there is no necessity to go through the time and expense involved in a full trial simply to bring out facts which are not disputed or immaterial.

[7] Appellee will be the first to admit that this is a case of importance, however the trial court was also fully aware of that fact since this point was repeatedly emphasized in the arguments of the able and diligent counsel for appellants. The mere fact that the material facts have been agreed to rather than extracted through the trial process does not mean that the trial court can't give careful consideration to what appellants described as a "violent clash" between two principals - the sanctity of private property on the one hand and the public right of navigation of marine highways of commerce on the other hand.

The trial court was fully aware of the importance of its decision. It had all the material facts before it which were needed to make a decision, and had exhaustive briefs from each counsel concerning the issues. The court also had ample time to make its own independent research. Therefore the trial court had all the tools which it needed to carefully weigh these two important principals and to carefully consider the facts and the law involved and make its decision correctly.

[7] [8]

In summary no case is "too important" for summary judgment when the material facts are not disputed. On the contrary, the trial court should be in an even better position to render "important" decisions through summary judgment, since it does not have to spend time making decisions on complicated issues of fact or weighing conflicting testimony, but can center its attention on the principals of law involved. The court's statements in the *Ilhenny* and *Audubon* decisions make it clear that the only contested fact in this case is not material to the issue that needs to be decided. Therefore, this lawsuit was in the correct posture for summary judgment.

Appellants' second specification of error is their claim that the trial court erred in finding that the canals in question are private and subject to private ownership and control. Although appellants argued in its brief that there has not been alot of thinking in this area, the idea of private canals is not by far a [8] new one in Louisiana. Many years ago the Louisiana Supreme Court decided the same issue in the case of *Harvey v. Potter*, 19 La. Ann. 264 (1867). The issue in that case was as follows:

> "Has the proprietor of a tract of land the right to excavate, entirely within his own boundaries, and exclusively at his own expense, a canal for the purposes of navigation, and to require payment for its use by all who choose to avail themselves its facilities."

The court went on to conclude that:

> "It is not easy to perceive how, in such a case, the public becomes seized of the right to the gratuitous use of advantages afforded by individual labor and enterprise. The right of expropriation, it is true, belongs to the public, and the land and the canal so

[8] [9]

> constructed upon it might, under constitutional and legal provisions, become public property, and be appropriated to public use . . .
>
> "Private property shall not be taken for public uses, without ample renumeration first made to the owner. This is a fundamental principle. So it would seem clearly to follow that private property can not be used by the public without compensation for that use. Suppose the plaintiffs, in this case should refuse to permit the defendant to use their canal, would an action of damages lie against the owner? If not, it must appear that the defendant is not entitled to require the use of the canal free of charge as he would have to require the free use of a navigable stream, or a public road."

The Supreme Court back in 1867 distinguished between what is commonly termed a navigable stream, and a privately constructed and privately owned navigable canal. At that time the court stated that the only method by which the public would have the right to use the canals is through expropriation, and in that instance the owner of the property would have to be compensated for the value of what was taken.

This may be the answer to the defendants' arguments that the canal is a navigable water of the United States, and subject to the power of Congress. Millions of dollars were spent in the construction of the canals in question. Perhaps Congress may have power over all navigable waters, whether public or private, but the Fifth Amendment to the U. S. Constitution clearly provides, [9] and it is a fundamental law of our State and Nation that private property can not be taken without just compensation. There has been no expropriation or appropriation by the Federal or State Government of these canals for public use. Congress has not chosen to exercise its power to

expropriate the canals for public use, and they are still subject to State law, which recognizes the private ownership of the canals.

Again, in the case of *Ilhenny v. Broussard*, supra, the Supreme Court recognized a land owner's right to construct, to own and to control a private canal on his property. That lawsuit was similar to the one at hand in the sense that it was an action by a property owner to enjoin a defendant from using a certain navigable canal belonging to the plaintiff. The court was of the opinion that the defendant did not have the right to use the plaintiff's canal *under any circumstances.*

The question of private ownerships of navigable canals was recently presented to the Third Circuit Court of Appeal in the case of *National Audubon Society v. White*, supra. That suit was another action for an injunction prohibiting the defendant from using a private navigable canal. The facts of that case are remarkably similar to those we are dealing with herein.

The evidence in the *Audubon* case indicated that the canal in question was constructed on private property and with private funds. The canal was navigable and used for various purposes by a multitude of persons since it was first built. There was evidence presented that it had been used for navigation by mail carriers, oil companies, cattlemen, sportsmen, hotel patrons, etc. for a period of at least fifty years, and was used often by the defendants. The owners of that canal had wardens who maintained supervision over the canal and prevented any persons from using the canal without permission. The evidence show that there were a number of signs along the canal route indicating its private nature. The canal owners had issued grazing permits and other written agreements for persons to use the canals. Even the Army Corps of Engineers had at one time obtained a permit to use the canals.

[10] The court found that the canal in question was not a public canal, subject to public use, that no right-of-way was ever expropriated by any public body for canal purposes and there had been no formal, tacit or implied dedication of the canal for public use.

Contrary to appellants contentions, the Court of Appeal did not simply treat this case as a "road dedication" case. The court carefully considered defendants' argument that navigable waters are owned by the public and are for public use. At page 665 of the decision the court stated:

> "In our Civil Code, things are classified as being either 'common or public'. L.S.A.-C.C. Art. 449. Running water, the sea and its shores are said to be *common things.* L.S.A.-C.C. Art. 450. Navigable rivers, highways and the beds of rivers, as long as they are covered with water are classified as being public things. L.S.A.-C.C. Art. 453. We do not consider the McIlhenny canal to be either a common or public thing. The canal was constructed with private funds on private property. It can not be said that the ownership of the canal 'belongs to nobody in particular', as provided in L.S.A.-C.C. Art. 450, or that title to the canal became 'vested in a whole nation' simply because it contained running water or because it was dug deep enough to become navigable.
>
> "We believe that a canal built entirely on private property, with private funds and for private purposes is a private thing, for the same reason that a road built on private property for private purposes is a privately owned road. See Vol. 2, Yianopoulos, Louisiana Civil Law Treatise, Sec. 31.5."

[10] [11]

There is no error in comparing private canals to private roads. Highways, like navigable rivers (streams) are classified as "public things", but it is well known and supported in our jurisprudence that there can be private roads subject to private ownership and control. If appellee's land were not primarily marsh land but suitable for road building, there is no doubt that appellee could have built, maintained and controlled the use of a private road system on its leasehold. The courts have likewise recognized that property owners can build, own and control navigable canals on private property. The canals are the most practical means of transportation in the marsh areas, and they are merely substitutes for private roads.

[11] The court in *Audubon* cited the Supreme Court decision of *Harvey v. Potter*, supra and *Ilhenny v. Broussard*, supra. The court concluded that the "plaintiffs have the right to regulate and control the use of that canal, including the right to prohibit the defendants from using it". The court also concluded that L.S.A.-R.S. 14:97 does not apply to a private canal, and distinguished the cases of *D'Albora v. Garcia*, 144 So.2d 911 (La. App. 4th Cir., 1962); and *Discon v. Saray, Inc.*, 262 La. 997, 265 So.2d 765 (1972), which appellants relied on in their brief. Writs to the Supreme Court were applied for in *Audubon*, but denied, the court stating at 305 So.2d 542, "on the facts found by the Court of Appeal, there is no error of law in the judgment below".

Appellants base their arguments on two Louisiana cases, *Discon v. Saray*, supra and *D'Albora v. Garcia*, supra. As mentioned above, these cases were dealt with in the *Audubon* case, and we'll not go into them any further. Appellants also cite a number of federal cases and base their main argument on their contention that these canals are "navigable waters of the United States", and thus private control over them is precluded.

[11] [12]

After a careful review of all of the federal cases cited by the appellants in their brief, it is obvious that none of those cases are on all fours with the case at hand, nor do they address the same issues. None of these federal cases dealt with the right to control private canals constructed wholly within private property and with private funds, and being continuously controlled by the owner or lessee thereof. Most of the cases dealt with the issue of whether or not parties were required to get permits from the Corps of Engineers to construct certain facilities or to engage in certain activities.

Appellants also cite 33 U.S.C.A. 403 which is a Federal Statute stating that a party cannot place an obstruction to the navigable capacity of a navigable water of the United States, without getting a Corps of Engineers permit. All of the cases under this statute deal with dredging, dumping trash in waterways, [12] or actual construction of buildings, warves, piers, bridges, etc. on waterways which are used by the public. These type of constructions affect the navigable *capacity* of the publicly used waterway. In the case at hand first of all, the waterway is not one which has been appropriated to the public use. Secondly appellees are not attempting to alter the capacity of the stream. Their capacity has been the same since they were built. Finally this statute can be compared to R.S. 14:97 which the *Audubon* court held did not apply to private canals.

Appellants directed much attention in their brief to convince the court that the canals in question are navigable, however this matter has already been agreed to. Appellant then cites many federal cases which they contend hold that since the streams are navigable they can not be subject to private control.

One of the main cases relied on by appellants is *United States v. Sexton Cove Estates*, 389 Fed. Supp. 602, 526 Fed. 2d 1293, which is a Florida case. The question in that case was whether a permit was required from the Corps of Engineers in order to

dredge canals. However the *Sexton* case is distinguishable from the case at hand, since in that case the canals in question were obviously dedicated for public use. They were built in connection with the development of a seventy-three acre mobile home subdivision, and the canals were shown on a plat which were prepared and filed in the public records in connection with the subdivision. The right to own and control the canals was not even presented to the court, the only question being whether or not a permit was required to dredge the canals.

Likewise, the case of *Tatum v. Blackstock*, 319 Fed. 2d 397, cited by appellants is another case dealing with Corps of Engineers jurisdiction. The question presented was not whether or not a private land owner could control activity on canals which he constructed with his own funds. Rather the issue dealt with whether or not a person was required to get a permit to do construction work which required building up water bottoms (a tidal [13] flat) and possibly affecting other navigable waterways. There was a "man-made channel" discussed in the decision, but the court did not state whether or not the channel was constructed with private funds and wholly within private property. It was alleged that the construction complained of affected the water levels in the "man-made channel" and other natural navigable waters around the tidal flat in question. The court did not make a decision, since it felt that any complaint was within the jurisdiction of the Corps of Engineers.

Thus the *Tatum* case does not address the issues presented in this case, and should not even be considered. In page 15 of their brief, appellants stated that the *Tatum* case stands for the proposition that man-made channels connecting with tidal waters become navigable waters of the United States notwithstanding that they are on private property. No where in the *Tatum* decision is it indicated that the lands were constructed on private property, or that they were constructed with private

funds. Simply because they were man-made does not indicate those conclusions. In addition, the specific issue of private ownership and control of privately built canals was not addressed.

Also on page 15 of their brief, appellants cite a "legion of federal cases" which supposedly states that navigable waters are not subject to private dominion and control, and the public has a paramount right of use therein. Let us examine what proposition these cases really stand for.

The first case in the legion is *United States v. Applachian Electric Power Company*, 61 Sup. Ct. 291 (1940). The issue in that case was whether or not the Federal Power Commission could require a license for the construction of a dam across the New River which ran through Virginia and West Virginia. It is obvious from reading that decision that the New River was a natural navigable waterway, and was not privately controlled, constructed and owned. The only holding in that case was that the Federal Government had dominion over the water power of the flow of a navigable stream.

[14] The next case in the legion cited was *United States v. Willow River Power Company*, 65 Sup. Ct. 761. This was an eminent domain case in which the government was expropriating private property. In that case the government had raised the water level in a natural stream, and by raising the water level three feet it reduced the power capacity of a privately owned electric plant situated on the stream. The question presented was whether or not raising the water level and thus reducing the power capacity of the electric plant constituted "taking" property so that the owner of the electric plant could be compensated for its loss. Obviously, that case has no application to the case at hand.

The case of *United States v. Twin City Power Company*, 76 Sup. Ct. 259 was also cited by appellants in its brief. This is another expropriation suit, and did not deal with a man-made stream. In this case the government appropriated property which abutted a natural navigable waterway. The riparian owners claimed that the fact that the land abutted a navigable stream, which was suitable for placing an electric plant thereon, should be taken into consideration in determining the value of the land taken. Therefore the question presented to the court was how to value the land taken and whether or not the value of the water flow in the stream should be considered. Again, it is obvious that that case is not applicable to the one at hand since the facts and issues were entirely different.

However the court in *United States v. Twin City* did cite another case entitled *United States v. Chandler-Dunbar*, 33 Sup. Ct. 667, which stated that the ownership of a private stream wholly upon the lands of an individual was possible under federal law.

The last case cited by appellants in its brief was that of *United States v. 421.75 acres, etc.*, 53 Fed. Supp. 143, which is a 1943 California case. This is another expropriation case which has no application to the case at hand. The question there was whether or not the United States Navy had to pay the defendant for [15] water bottoms taken for use as a Navy fueling yard. It is important to note that the property involved was not a privately built waterway. The court in that case held that the property could not be expropriated unless the Navy compensated the owners of the water bottom for the property taken.

In summary, this writer frankly finds it easy to see how the *Tatum*, *Sexton Cove Estates*, and the other cases cites can simply be ignored by the courts of our state. They do not deal with the issues that are presented in this lawsuit, where on the

contrary, there are Louisiana cases which are squarely on all fours with the case now before this court, and which must control. The only way the public can gain access to the free use of these canals is if they were expropriated by a governmental body, and appellees were compensated for the enormous amount of money spent in dredging and developing these canals. Therefore appellant prays that this court will continue to follow principals enunciated in the *Harvey v. Potter*, *McIlhenny v. Broussard*, and *National Audubon Society v. White* cases in recognizing rights of private citizens to construct navigable canals on their private property, and control the use thereof.

RESPECTFULLY SUBMITTED,

COOPER & SONNIER

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER

BY: /s/ John E. Ortego
JOHN E. ORTEGO

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing pleading on all counsel of record herein by mailing a copy to said counsel this day.

Abbeville, La., 9/12, 19 77.
/s/ John E. Ortego, Attorney
Cooper & Sonnier
121 East St. Victor
Abbeville, La. 70510

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NOS. 6258, 6259, 6260

VERMILION CORPORATION

PLAINTIFF-APPELLEE

VERSUS

NORMAN VAUGHN, FREDDIE BROUSSARD AND LARRY J. BROUSSARD

DEFENDANTS-APPELLANTS

APPEAL FROM THE 15th JUDICIAL DISTRICT COURT, VERMILION PARISH, LOUISIANA, HONORABLE ALLEN M. BABINEAUX, PRESIDING JUDGE.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANTS, NORMAN VAUGHN, LARRY J. AND FREDDIE BROUSSARD

MOUTON, ROY, CARMOUCHE, BIVINS & HILL

BY: /s/ John Hill
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COUNSEL FOR DEFENDANTS-APPELLANTS

[1] MAY IT PLEASE THE COURT:

Judge Domengeaux during oral argument discussed briefly *United States v. Kaiser-Aetna*, 408 F.Supp. 42, D.Hawaii, 1976.

Although a review of the subsequent jurisprudence reveals that *United States v. Kaiser Aetna* has not been cited, approvingly or otherwise, in federal cases, and also reveals no appellate action with regard thereto, the case is nevertheless interesting and instructive.

In *Kaiser Aetna*, the United States asked for a declaratory judgment and injunction to have Kuapa Pond [The Hawaii Kai Marina] declared "navigable waters of the United States" and to have a "navigation servitude" imposed thereon.

The Pond and Marina are situated wholly on property privately owned by the Bishop Estate, and leased to Kaiser Aetna.

The government contended that:

(a) The Pond was navigable in its natural state; or

(b) Was made so by subsequent development.

KUAPA VS. PECAN ISLAND - THE NATURAL STATE

The Pond in its natural state was navigable only by shallow draft canoes. It was adjacent to the Pacific Ocean, but separated therefrom by a barrier beach. Some of the Pond's water was from the sea, and the remainder from mountain run-off. It was affected by tidal action in its natural state.

However, in its natural state boat travel from the Pond to the ocean was not possible, even in shallow draft canoes, due to the existence of the barrier beach and stone wall reinforcements.

The Pond in its natural state was always considered private by the people and government of Hawaii. Prior to Hawaiian statehood and, indeed, prior to Hawaii becoming a territory of the United States, the various fish ponds adjacent to, but apparently separated from, the surrounding oceans were a part of the Hawaiian feudal system, totally controlled by a tribal chief who allowed sub-chiefs or subjects to fish or not to fish at his will.

[2] In 1848, the Hawaiian King gave the Pond property and fast land surrounding same to the Bishop Estate's ancestors in title.

Until 1961, the Kuapa area had been used solely and only as a fish pond, governed by the foregoing custom and practices.

Another stark factual-legal difference between the Kuapa Pond matter and the instant one is revealed by the Court's discussion at Page 51 of the opinion. The fish pond customs of old Hawaii were peculiarly local in history and culture. They were "unique" and were even specifically exempted from public access to their waters via Hawaiian legislation:

> "The Organic Act of 1900, following annexation, repealed all prior laws conferring private rights in *seawater* fisheries (subject to vested rights) but specifically exempted fishponds from its scope. A similar provision appears in the Hawaii Constitution, article X, §3. Opinions since annexation and statehood confirm the private nature of fishponds in Hawaii." (Emphasis theirs)

Therefore, it is readily apparent that there were significant factual, legal and customary differences between the Kuapa Pond area in its natural state, and the Fresh Water-Rollover Bayou areas South of Pecan Island in their natural state:

[2] [3]

(A) Kuapa Pond was in its natural state essentially separated from the ocean, certainly in the sense that boat traffic could not navigate from the Pond to the ocean. It was not open to the sea.

In the instant case, the facts which are readily apparent from a simple study of the official Louisiana map, from the matters on which the parties are in agreement in this case, and also from that which the appellants hope to prove should Your Honors reverse the trial court's decision, are that the area South of Pecan Island from Fresh Water Bayou to Rollover Bayou was, via at least those waterways, and perhaps others, in its natural state, open to the Gulf. Indeed, Fresh Water Bayou, as is evident from official Louisiana maps, but, more important, as appellants shall seek to prove at trial, was one of the principal highways of commerce of [3] the denizens of Pecan Island for many years. Fresh Water Bayou coursed from the Gulf to Pecan Island and beyond, and appellants believe they will be able to prove that same was used by the residents of Pecan Island to transport cattle, mail, groceries and people to and from the Island. Thus, in their natural states, the Hawaiian pond was hermetic and not open to the sea. The area and waterways South of Pecan Island in their natural state were open to the sea and were highways of commerce.

(B) Unlike Kuapa Pond, there is no evidence that the waterways, particularly Fresh Water Bayou and perhaps others, in the Pecan Island area were ever considered private in their natural state either by the people who lived there, or by the government and laws of the State of Louisiana. The Hawaiian Court went to prominent length to show that Kuapa Pond was considered quite private by both people and government. Indeed, Hawaii's history and culture, in which the customs of usage of the Pond developed, were feudal, and thus had virtually nothing in common with the Louisiana experience, at least post-1803.

[3] [4]

(C) Finally, there to the writer's knowledge are simply no counterparts in Louisiana legal history to the specific constitutional and statutory provisions in Hawaii, dating back to at least 1900, to the effect that the Hawaiian fish ponds were to be considered private property. This is truly a great difference between the area involved in the *Kaiser Aetna* case and the area involved in this case, when both are considered in their natural states.

HAWAII KAI VS. PECAN ISLAND – AS IMPROVED

The Hawaiian Court then discussed the facts of the development of the Kuapa Pond into Hawaii Kai Marina post-1961: In 1961, the Kaiser Aetna interests leased from the Bishop Estate the Pond, and applied to the Corps of Engineers for permits to dredge and channelize. The Corps at that time advised Kaiser Aetna that no permits were needed.

Kaiser Aetna thereafter dredged, and after development of the area and opening same via channel to the ocean, allowed [4] owners of subdivision lots in the area an easement to operate their boats on the Pond, and in the channel to the sea. A 25-passenger sightseeing boat was operated by Kaiser Aetna in the area, presumably as an enticement to potential subdivision lot buyers. This passenger boat was then taken over by the merchants' association of the subdivision area, but apparently at all times operated only in the Pond waters, and not in the open sea.

These facts of the subsequent development are substantially different from those of the development in the Pecan Island area by the Vermilion Corporation's ancestors in title:

There is no apparent history of the Corps of Engineers' having gone on record at any time indicating that permits were not needed in the Pecan Island area prior to the development of

canals. Furthermore, after the development of the Humble Canals, which are generally speaking 60 feet in width by 8 feet in depth, commercial and navigational use has not been limited to sightseeing by land owners in the area. In the Pecan Island area, barges, dredges, shrimp boats and various other kinds of fishing boats, not only owned or working in the interest of the Vermilion Corporation, but others, have regularly used these canals.

THE LAW

The Hawaii Court's discussion of the law is instructive.

First, at Page 48 of the opinion, one sees that the concept of "navigable waters" grew out of the "common right of piscary [fishing]" of the English common law. This was the right simply to travel on common waters, and to fish them.

Also on Page 48, one should note the Court's brief discussion of the Commerce Clause – Article 1, Section 8, Clause 2. Jurisdiction of the surface of navigable waters of the United States passed to the government of the United States upon ratification of the Constitution.

A crucial legal difference between the instant matter and *United States v. Kaiser Aetna* is evident from the following quote from the Hawaiian case:

> [5] "Jurisdiction over the surface of navigable waters lying wholly within a single state, and not connecting with other waters to form a navigable highway of interstate commerce, remained with the situs state."

In the instant case, the "navigable waters" in question in the Pecan island area, in both their natural state – prior to the

"Humble Canal" development – and in their artificially developed state thereafter - unquestionably connected "with other waters to form a navigable highway of interstate commerce."

Accordingly, and as appellants have urged all along, this matter is not to be decided by state law, but by federal law, as this is a matter of federal jurisdiction, and not of jurisdiction of waters which do not connect with "navigable highways of interstate commerce."

And what is the federal law, if the waters in the Pecan Island area were navigable *prior* to the Humble Canal development? Note Page 49 of the Hawaiian opinion:

> "If Kuapa Pond was navigable water of the United States prior to its development by defendants, such development would not have destroyed that status, absent a specific Congressional abandonment of the waters, and the marina would, unquestionably be subject to the public's right of access. See *Economy Light & Power Co. v. United States*, 256 U.S. 113, 124, 41 S.Ct. 409, 65 L.Ed. 847 (1921)."

In the instant case, Vaughn, Broussard and Broussard sought to prove in the Trial Court that the waterways in the Pecan Island area, particularly Fresh Water Bayou, were "navigable waters" prior to their development and augmentation artificially by the Humble-Vermilion Corporation interests. If that can be proved, it is clear from the above quotation that that development and augmentation artificially of the waterways in the areas could in no way deny or remove their already existing status as "navigable waters of the United States.

Certainly one knows that Humble developed channels which physically were not exactly present in the area theretofore.

[5] [6]

But, in so developing and changing, if same was done at the expense of a natural navigable system, how can Humble's predecessors *deny* to the public that which Humble took *from* the public?

[6] The affidavit of appellants in the Trial Court, and a simple view of the official maps of the State of Louisiana over the years, indicate that the old Fresh Water Bayou – in its state prior to the development by Humble of its canal system – flowed into the Gulf. Indeed, the entire area, from roughly Pecan Island on the North, to the Gulf on the South, to Roll-over Bayou on the West, and to Fresh Water and beyond on the East, is now and always has been tidal. All parties are in agreement as to the latter statement. The Court should consider these facts against the following quotation from the Hawaiian case:

> "As indicated above, unquestionably the Pacific tides ebbed and flowed over Kuapa Pond in its pre-marina state. Maps and surveys, as well as the bases of fishpond aquaculture, establish that there would have been at least a minimum basis for federal jurisdiction if the ebb and flow test could be applied, because some of Kuapa Pond was *always* inundated. Therefore, *if it were not for the unique legal status of Hawaiian private property, free and clear of any claim by the Crown either to the beds thereof or the waters thereon under Hawaiian law prior to annexation, and their protection then and thereafter as such by statute and Constitution, application of the ebb and flow test would have established a public right of access to Kuapa Pond.*" (emphasis ours).

Thus, there is yet another crucial difference between the Hawaiian case and the instant matter. Surely no one can or does claim that the natural navigable water system that existed

[6] [7]

in the Pecan Island area prior to the development by Humble, et al of the artificial canal system fell within the "unique legal status . . . as strictly private property." Indeed, the facts which either are not disputed, or if pro forma disputed, which can easily be proved at trial by appellants, are that just the opposite was true prior to the development by Humble, of the artificial canal system.

Accordingly, if one assumes that the Hawaiian case accurately states the law which bears upon the instant case in all respects, appellants feel that the Court's conclusion in this case must be, at the very least, that the Motion for Summary Judgment was improperly granted by Judge Babineaux, as, if plaintiff's version of the facts is true, the natural navigable waterway system on and South of Pecan Island prior to the [7] development by Humble of its artificial canal system was (1) navigable, (2) "navigable water of the United States," and, (3) there was thus, prior to the development of the artificial canal system, a "public right of access" in and to these waters.

The Hawaiian Court concluded that Kuapa Pond in its natural state was never subject to public use. Since appellants seek to prove, and should have been given the opportunity to prove, that the pre-existing navigable waterway system in the Pecan Island area was always subject to public use prior to the development of the Humble canal system, the Hawaiian case not only fails to support the Vermilion Corporation's position, but indeed supports just the opposite conclusion.

It is clear from a reading of the Hawaiian opinion that had Kuapa Pond been found to have been a waterway which in its natural state was open to public use, no change or alteration thereof, and no building of a private waterway system at the expense of that natural navigable waterway system would have been permitted.

[7] [8]

In other words, a private developer cannot take from the public what the public already has, and then demand compensation for it as a defense to the public's claiming its right of use.

Finally, it is clear that the Kaiser Aetna case shows that, even if an area like Kuapa Pond be "private", if that area, through subsequent private development, be made in fact to support commerce, the navigation servitude may arise. Indeed, the Hawaiian Court held specifically that Kuapa Pond, although private in its natural state, by virtue of the improvements thereon done by a private developer and by virtue of the uses to which the subsequent improved areas was put, had become "navigable waters of the United States." This holding directly supports another of appellants' contentions in this matter.

However, since in the instant case, it is either already an acknowledged fact between the parties that there was a pre-existing natural navigable waterway system, open to public use, in the Pecan Island area, or, at the very least, since that fact is in dispute between the parties and may very well be proved by appellants if [8] given a chance at trial, and since the Humble interests merely developed, at the expense of that natural navigable waterway system, an artificial waterway system in its place, and thus simply *substituted* a pre-existing natural navigable waterway system with an artificial one, the Hawaiian case can only stand for the proposition that the subsequent waterway system is no less burdened with the "navigation servitude" than was the former one, and it can hardly be said that the developer of the artificial canal system is entitled to compensation for giving to the public in another form that which the public already had by virtue of its rights under the Constitution of the United States.

Finally, the Hawaiian case should be read in light of the state and Fifth Circuit area cases which have been cited to Your Honors by appellants:

[8] [9]

In *Dalbora v. Garcia*, and *Discon v. Saray*, when a private developer created a navigable waterway system, even though one had not existed theretofore, our state court system imposed a "navigation servitude" on those waters. Although *Dalbora* and *Discon* discuss numerous reasons for the granting of relief, appellants believe it is artificial, inaccurate, and unrealistic to believe that those cases in their totality stand for any proposition other than that advocated by appellants in this matter.

The Florida Federal Court case, *United States v. Sexton Cove Estates*, supports the same proposition, and cites a Fifth Circuit case, *Tatum v. Blackstock*, as support for its holding.

The "navigation servitude" has been with us since the ratification of the United States Constitution. Before that it was a creature of the English law. Appellants thus do not come to this Court seeking the establishment of some new and revolutionary principle which does violence to the institution of private property. Appellants do not seek to deprive anyone of any property, let alone without compensation.

[9] Appellants merely seek from this Court, via reversal of Judge Babineaux' granting of the Vermilion Corporation's Motion for Summary Judgment, recognition of the following:

(a) That there are substantial matters of fact which bear heavily upon a proper disposition of this case, which are either disputed between the parties, and/or had not as yet been fully developed by either party;

(b) That, if a private developer develops a waterway system which becomes "navigable water of the United States," and develops it in and virtually *over* a pre-existing natural navigable waterway system, the public has a "navigation servitude" on the newly developed waterway system, and owes the private developer nothing simply for that developer's changing the form of that which the public already had.

[9]

Respectfully submitted,

MOUTON, ROY, CARMOUCHE, BIVINS & HILL

BY: /s/ John Hill
JOHN K. HILL, JR.
P. O. DRAWER Z
LAFAYETTE, LA 70502
ATTORNEYS FOR APPELLANTS

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Supplemental Brief on behalf of Appellants has been mailed to Mr. Charles Sonnier, counsel for Appellee herein.

Lafayette, Louisiana, January 13, 1978.

/s/ John Hill
JOHN K. HILL, JR.

EXHIBIT E

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, Notary Public in and for the aforesaid Parish and State, this 23 day of May, 1977, personally came and appeared:

NORMAN VAUGHN, FREDDIE BROUSSARD and LARRY J. BROUSSARD, all of the full age of majority and residents of the Parish of Vermilion, Louisiana.

who, on their oaths, declared:

As long as deponents can remember, the Humble Canal System has been used by fishermen, hunters, trappers, sportsmen, and generally anyone who wanted to use same. Broussard's and Hazel's Landings have been public landings and launch ramps on the Humble Canal System for years.

Prior to the development of the Humble Canal System, deponents are aware that various portions of the natural navigable waterway system in the area of Pecan Island, for example, Little Rollover Bayou and Freshwater Bayou, were actually used for purposes of transporting mail, transporting cattle, and transporting people, to and from Pecan Island on various kinds of small vessels. These natural waterways only ceased to be useable for these purposes after Humble developed its artificial waterway system.

AND FURTHER DEPONENTS SAITH NAUGHT.

/s/ Norman Vaughn
NORMAN VAUGHN

/s/ Freddie Broussard
FREDDIE BROUSSARD

/s/ Larry J. Broussard
LARRY J. BROUSSARD

SWORN TO AND SUBSCRIBED before me this 23 day of May, 1977, at Lafayette, Louisiana.

/s/ illegible
NOTARY PUBLIC

EXHIBIT F

SUPREME COURT OF LOUISIANA

NO. _____

VERMILION CORPORATION,

Plaintiff-Appellee

VERSUS

NORMAN VAUGHN, ET AL

Defendants-Appellants

* * * * * * * * * * * * * * * * *

APPLICATION FOR WRIT OF CERTIORARI OR REVIEW

* * * * * * * * * * * * * * * * *

From the Court of Appeal
Third Circuit
Docket Nos. 6258, 6259, 6260

* * * * * * * * * * * * * * * * *

Application by Norman Vaughn,
Freddie Broussard and Larry J. Broussard

MOUTON, ROY, CARMOUCHE, BIVINS
& HILL

BY: /s/ John K. Hill, Jr.
JOHN K. HILL, JR.
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[1] STATEMENT OF THE CASE

Vermilion Corporation, Lessee from Exxon Corporation of a large portion of the Louisiana Wetlands in Vermilion Parish South of Pecan Island (including lands from the Intracoastal Waterway on the North to the Gulf of Mexico on the South, and from West Chenier Au Tigre on the East to Rollover Bayou on the West) brought suit in Vermilion Parish against Relators Vaughn, Broussard and Broussard, alleging that Relators had "trespassed" on the plaintiff's leasehold via using Vermilion Corporation's canal system developed by plaintiff and its predecessors in title on the leasehold, and by fishing and shrimping therein, all without permission of the Vermilion Corporation.

Relators answered, pleading in the main that these canals are "navigable waters of the United States" and that, under both federal and state law, the public has a paramount easement of use thereof, and that the canals are thus not subject to private dominion, ownership or control. The cases, being virtually identical, were consolidated.

Vermilion Corporation filed a Motion for Summary Judgment in the Trial Court, and, in reasons filed on June 7, 1977, the Honorable Judge Babineaux granted the summary judgment, holding, in effect, that the canals on the leasehold are private, privately owned, and subject to private control. Judgment pursuant thereto was signed on 22 June 1977. Motion and Order for Appeal was signed on the same date, and the appeal was timely perfected.

The matter was briefed and argued in the Court of Appeal and on February 6, 1978, by Judge Domengeaux, the Court of Appeal rendered its decision which affirmed Judge Babineaux' granting of the Vermilion Corporation's Motion for Summary Judgment in all three cases. Relators made no application for

rehearing, but have applied directly to this Court for the issuance of a Writ of Certiorari or Review, seeking reversal of the Judgments of the Trial Court and of the Court of Appeal, Third Circuit.

[2] STATEMENT OF FACTS

The ancestors in title of the Vermilion Corporation at various times since roughly 1940 built with private funds on their privately owned lands canals which generally speaking are 60 feet in width by eight feet in depth. The canal system thereby developed is entirely unitary in that no part thereof is sealed or separate from any other part. Furthermore, the canals, from their several beginnings on or near the South side of Pecan Island, Louisiana, flow southerly a few miles into the Gulf of Mexico, and the canal system otherwise connects with Fresh Water Bayou Canal and the Intracoastal Waterway.

The entire canal system is clearly subject to tidal fluctuation, and is unquestionably and undisputedly navigable in fact.

In the Trial Court, the Vermilion Corporation, in its Motion for Summary Judgment, in effect admitted the truth of the majority of the Relators' factual allegations, which Relators believe supported their claim that the canal system is navigable in fact, navigable in law, and thus is navigable water of the United States, not subject to private dominion and control, but burdened with a navigation servitude in favor of the public.

The only significant factual allegation made by Relators which the Vermilion Corporation disputed in the Trial Court and in the Court of Appeal was that, in building this artificial canal system, the Vermilion Corporation's ancestors in title had used, impaired, and finally destroyed the *factual* navigability of certain *natural* navigable waterways which formerly existed in this area. Specifically, at all times in this litigation Vaughn,

Broussard and Broussard have alleged that Fresh Water Bayou, on and prior to the time of development of the artificial canal system, existed in a natural state, flowed from a point North of Pecan Island, southerly to the East of Pecan Island, and thence Southerly to the Gulf, and that this natural navigable waterway was an actual highway of commerce for the [3] citizens of Pecan Island and landowners in the area. Indeed, it was the contention of Relators in the courts below that Fresh Water Bayou had been used prior to the development of the artificial canal system in the area to transport cattle, groceries, human beings and the United States Mail to and from Pecan Island.

Furthermore, and most important, Relators alleged in the Trial Court, and swore to in affidavits, that those natural navigable waterways [particularly Fresh Water Bayou] became unuseable as such only when the Vermilion Corporation's ancestors in title built their artificial navigable waterways in the area, and as a direct result thereof. It is this exact point which is in vehement dispute between the parties, as, although the Vermilion Corporation does not to Relators' knowledge dispute that Fresh Water Bayou was once used as a navigable waterway, respondent does dispute heartily that its destruction was due to the actions of Humble Oil Company, et al, in building an artificial canal system essentially on top of the old Fresh Water Bayou and its allied waterways.

[4] **ASSIGNMENT OF ERROR NO. 1**

THERE WAS GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER OR NOT THE ANCESTORS OF THE VERMILION CORPORATION USED, DIVERTED AND DESTROYED PRE-EXISTING NATURAL NAVIGABLE WATERWAYS IN ORDER TO BUILD THEIR ARTIFICIAL WATERWAY SYSTEM, AND THUS ON THAT ACCOUNT ALONE SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED BY THE TRIAL COURT, AND ITS GRANTING SHOULD HAVE BEEN REVERSED BY THE COURT OF APPEAL.

A simple reading of the affidavit submitted by Relators in opposition to the Motion for Summary Judgment in the Trial Court, as against the deposition of the respondent's Chief Executive Officer, Mr. John Donohue, shows that on this one crucial factual point the parties are in stark disagreement.

Presumably, the Vermilion Corporation does not deny that, prior to the development of the artificial canal system in the Pecan Island area, there was a natural navigable waterway system – primarily Fresh Water Bayou – which was used by the residents of Pecan Island to transport their cattle, their mail, their groceries and themselves to and from their homes. The Fresh Water Bayou in its former natural state allowed one, for example, to navigate in shallow draft vessels from Pecan Island south, thence to debouch into the Gulf of Mexico.

What is in dispute between the parties is whether or not the Vermilion Corporation's ancestors in title, in digging their artificial canals, and in tying those canals to other unquestionably navigable waterways, thereby destroyed the navigability of the pre-existing natural navigable waterway system.

[4] [5]

Admittedly, there was very little otherwise which was or is in dispute between the parties.

However, if the resolution of this one factual dispute would have any effect on the ultimate disposition of this inquiry then the clear statutory and jurisprudential law dictated that summary judgment should have been denied. LSA - C.C.P. Articles 966 through 969, and, for example, *Laufer v. Touro*, 334 So.2d 541, [5] *Savoy v. Action Products Company*, 324 So.2d 921, and *Rosen v. Capital City Press*, 314 So.2d 511, dictate that the remedy of summary judgment must be used cautiously, is no substitute for trial, requires the resolution of all doubt concerning dispute as to issue of fact concerning trial on the merits, and can be granted only when the mover is clearly entitled thereto. Even should a Court feel that the party against whom Summary Judgment is sought has little chance to prevail at trial, the Motion for Summary Judgment nevertheless must be denied if there is "genuine issue of material fact" present in the lawsuit.

For reasons which shall be discussed *infra*, the resolution of this one factual dispute in itself could dictate which party would prevail as a matter of law. If that is the case, for this simple procedural reason a writ should issue and the Judgment of the Court of Appeal and Trial Court granting summary judgment in favor of the Vermilion Corporation should be reversed, and the matter remanded for trial on the merits.

[6] [6]

[6] ASSIGNMENT OF ERROR NO. 2

IT WAS ERROR FOR THE TRIAL COURT AND THE COURT OF APPEAL TO FAIL TO RECOGNIZE AND APPLY THE LEGAL PRINCIPLE THAT, SHOULD A PRIVATE PARTY DEVELOP AN ARTIFICIAL NAVIGABLE WATERWAY SYSTEM ON ITS OWN PROPERTY VIA DIVERSION, USE AND DESTRUCTION OF A PRE-EXISTING NATURAL NAVIGABLE WATERWAY SYSTEM IN THE SAME AREA, THE SUBSEQUENT DEVELOPMENT WOULD NOT DESTROY THE STATUS OF THE WATERWAYS AS NAVIGABLE WATER OF THE UNITED STATES, BUT WOULD IMPOSE UPON THE SUBSEQUENT DEVELOPMENT A PUBLIC RIGHT OF ACCESS AND NAVIGATION.

Article 1, Section 8, Clause 3 of the Constitution of the United States gives to the United States jurisdiction of the surface of "navigable waters of the United States." *Martin v. Waddell's Lessee*, 41 U. S. 367, 10 L.Ed. 997 [1842].

"Navigable waters of the United States" are not subject to private dominion or control, and the public has a servitude of navigation thereon:

> "The concept of 'navigable waters' grew out of the 'public common of piscary,' i.e., the right of the common people of England to travel upon the waters and to fish them.
>
> * * *
>
> "The term 'navigability' has many legally distinct applications. [1] It may determine title to river and lake beds. [2] It has been the touchstone of congressional jurisdiction over waters via the Commerce Clause. [3] It embodies the navigation servitude, a

[6] [7]

modern declaration of the common law right of access of waters. In addition [4] Admiralty jurisdiction in federal courts flows from the general concept of navigability."

> *United States v. Kaiser-Aetna*, 408 F.Supp. 42, 48-49, D.C., Hawaii 1976. See also *United States v. Appalachian Elec. Power Co.*, 61 S.Ct. 291, 307-308 (1940); *United States v. Willow River Power Co.*, 65 S.Ct. 761, 766-767 (1945); *United States v. Twin City Power Co.*, 76 S.Ct. 259, 261-262 (1956); *United States v. 421.715 Acres etc.*, 53 F.Supp. 143, 148 N.D. Cal. (1943).

If Vaughn, Broussard and Broussard had been allowed in the Trial Court to proceed on the merits, they would have defended the Vermilion Corporation's action for trespass via, inter alia, [7] attempting to prove as a fact the "navigability" of Fresh Water Bayou and other natural waterways in the Pecan Island area prior to the development of the Humble Canal System.

In so proving, Relators ipso facto would have shown that prior to the development of the artificial canal system, there was a system of natural "navigable waters of the United States" in the area, subject to a "navigation servitude," in favor of the public, as they would have shown that there existed bodies of water suitable for use for transportation and commerce, which could have been made even more suitable therefor by reasonable improvements, which was actually used for both private and commercial navigable purposes, which was subject to tidal fluctuation, and which open to and provided access to the open sea. See the various criteria for determination of status as "navigable waters of the United States" in *United States v.*

[7] [8]

Cannon, 363 F.Supp. 1045, District Court, Delaware, 1973; *United States v. Pot-Nets, Inc.*, 363 F.Supp. 812, D.C. Delaare, 1973; *United States v. Underwood*, 344 F.Supp. 486, Florida, 1972; *United States v. Stoeco Homes*, 498 F.2d 610; *United States v. Moretti*, 478 F.2d 428; and *United States v. Lewis*, 355 F.Supp. 1132.

In the above cited *United States v. Kaiser-Aetna*, it was claimed that Kuapa Pond, prior to artificial development which enhanced and enlarged it, and which opened it to the ocean, was "navigable water of the United States" burdened with a "navigation servitude." Although the particular factual and legal background of Hawaiian tidal ponds dictated a different result, a particular portion of the opinion of the Court in that case shows exactly why proof in the instant matter of pre-existing navigable status of Fresh Water Bayou, et al, would have dictated ultimately a ruling against the Vermilion Corporation and in favor of Relators on the core questions of the lawsuit:

> "If Kuapa Pond was navigable water of the United States prior to its development by defendants, *such development would not have destroyed that status*, absent a specific congressional abandonment of the waters, and the marina would unquestionably be subject to the public's right of access. [8] See *Economy Light & Power Co. v. United States*, 256 U.S. 113, 124, 41 S.Ct. 409, 65 L.Ed. 847 [1921]." *Supra*, Page 49.

Furthermore, if via building of an artificial navigable waterway system in the Pecan Island area the Vermilion Corporation's ancestors obstructed or destroyed the "navigable capacity" of a "highway of commerce," these oil companies would have ipso facto violated 33 U.S.C. 403 and L.S.A.-R.S. 14:97. 33 U.S.C. 403 states that no person may pose any "obstruction"

to the "navigable capacity" of "navigable waters of the United States" and *United States v. Republic Steel,* 80 S.Ct. 884, says that "obstruction" means any kind of "obstruction" and not simply that delineated specifically in 33 U.S.C. 403.

R.S. 14:97 says that no one may obstruct a "highway of commerce" including a "navigable waterway." May the law countenance the development of a privately controlled waterway system via the use and destruction of a public waterway system? Of course not, and 33 U.S.C. 403, as well as R.S. 14:97, are merely statutory reflections of the existence of a "navigation servitude" which was born in the common law, and preserved in the United States Constitution. The remedy, as *United States v. Kaiser-Aetna* shows, for the violation of this constitutional principle, and for the specific violation of 33 U.S.C. 403 and R.S. 14:97, is to say that the navigation servitude which existed on natural navigable waterways prior to the development of an artificial waterway system, but which was destroyed in fact via that development, is simply transposed in law to and upon the new artificial canal system.

Judge Babineaux thought it made no difference whether or not there was in the Pecan Island area prior to 1940 a natural navigable waterway system, which was impaired or destroyed via the subsequent development of a "private" waterway system. The Court of Appeal, Third Circuit, agreed. Accordingly, since the resolution of the factual dispute of the parties on this point was erroneously held by the Courts below to have made no difference, a Motion for Summary Judgment was wrongly granted, and its granting was erroneously affirmed.

[9] **ASSIGNMENT OF ERROR NO. 3**

MANMADE CHANNELS WHICH ARE NAVIGABLE AND WHICH CONNECT WITH OTHER NAVIGABLE WATERS BECOME "NAVIGABLE WATERS OF THE UNITED STATES" NOTWITHSTANDING THAT THEY ARE ON PRIVATE PROPERTY AND ARE DEVELOPED WITH PRIVATE FUNDS, AND, AS THE UNDISPUTED FACTS SHOWED THAT THE CANALS DEVELOPED BY RESPONDENT'S ANCESTORS IN TITLE ARE NAVIGABLE IN FACT, AND ARE CONNECTED TO TIDAL AND OTHER NAVIGABLE WATERS, IT WAS ERROR FOR THE COURTS BELOW TO FAIL TO HOLD THAT A NAVIGATION SERVITUDE AROSE IN FAVOR OF THE PUBLIC ON THE HUMBLE CANAL SYSTEM, WHICH PREVENTS PRIVATE DOMINION AND CONTROL.

As is evident from a review of the record, the parties agree that the sixty foot wide by eight foot deep artificial canal system developed by Vermilion Corporation's ancestors in title is navigable in fact: Crew boats, cargo boats, fishing boats, drilling barges, and similar vessels have regularly used these canals since their creation.

Furthermore, one can launch a boat at one of the headwaters of this canal system on the South side of Pecan Island, and from there navigate South into the Gulf of Mexico, or East into West Chenier Au Tigre Canal or Fresh Water Bayou Canal, or North to Schooner Bayou and Intracoastal Waterway. In other words, this unitary canal system would allow one to leave Pecan Island in a boat and sail unimpeded to Jacksonville, Florida, via the Intracoastal Waterway, or to Buenos Aires by the open ocean.

It is also undisputed that the waters of this canal system are brackish; many of the fish species therein are of salt water

origin. Daily these canals rise and fall perceptibly with the tides.

In *United States v. Sexton Cove Estates*, 389 F.Supp. 602, and in *United States v. Kaiser-Aetna, supra*, Page 53, one sees unquestioned recognition of the proposition that, although a canal system be developed with private funds on private property, if the canals created thereby are navigable in fact and are subject to tidal fluctuation and otherwise connect with other "navigable waters of the United States," the canals so created themselves become "navigable waters of the United States," subject to the "navigation servitude."

[10] In other words, the concept of private dominion from the sky to the center of the earth for him who owns the land ceases now, as it always has, when that private developer, on his private property, digs enough of a ditch, and connects it with other navigable waterways to such an extent, that enough water flows through the ditch to support commerce. The private owner's property is not thereby expropriated. Nothing is taken away from him. There simply arises, for purposes of surface use of the waterways, a servitude in favor of the citizens of the United States generally to navigate over and fish upon those waters, and to that limited extent, the private owner who built the canals cannot control their use.

There is nothing new about this principle in the law of Louisiana. Despite numerous attempts by the Court of Appeal, Third Circuit, in *National Audubon Society v. White*, 302 So.2d 660, writ denied 305 So.2d 542, to distinguish *Discon v. Saray, Inc.*, 262 La. 997, 265 So.2d 465 [1972], and *D'Albora v. Garcia*, 144 So.2d 911, La. App. 4th Cir., 1962, the fact is that a fair reading of these cases indicates that they recognize the principle set forth in *Sexton Cove Estates* and *Kaiser-Aetna* to the effect that privately developed canals, if they are navigable, and if they are connected with other navigable waterways, themselves become subject to a "navigation servitude."

The Trial Court in following *National Audubon Society v. White*, and the Court of Appeal, Third Circuit, in originally rendering the opinion therein and in following it in this case, committed error, for, despite the fact that it is undisputed between the parties to this litigation that the Humble canal system is navigable in fact and navigable in law, and connected to other waterways also navigable in fact and navigable in law, both Courts held that as a matter of law it made no difference; that the canals were nevertheless private property, subject to private dominion and control.

[11] SUMMARY AND CONCLUSION

In this case, there appears to be a clash of competing interests. That clash is illusory, because such clash as there may have been between private property on the one hand, and the public right of navigation and navigable waters on the other was resolved hundreds of years ago in the English Common Law, thence in the United States Constitution, thence in the cases construing same, thence in the statutes of the United States and the State of Louisiana. On and over "navigable waters" the public is entitled to traverse without having to answer to private owners of the banks or the beds. That is the way it has always been, and that is the way it should be in this case, and in the future.

The Relators should have been allowed in the Trial Court the opportunity to prove at a trial on the merits that, before the Vermilion Corporation's ancestors ever dug the first big ditch in the area, there were natural canals and bayous which were navigable in fact, and thus navigable in law, thus subject to the navigation servitude.

Relators then should have been allowed the opportunity to prove that those natural navigable waterways were impaired and destroyed in their navigable capacity only when the oil

industry built artificial canals on, over and through the natural waterways, thus starving and killing them.

Had Summary Judgment not been granted, and had Relators proved these factual contentions at trial, then the Trial Court would have been compelled to decide that the "navigation servitude" which existed on the natural waterways prior to the development of the Humble canal system did not die, but devolved upon the artificial system which was built in place of the natural.

Finally, and in any event, the Courts below should have recognized that the law of this state and of the United States is that "navigable waters of the United States" acquire their status not only via natural development, but via artificial, manmade, privately funded construction which creates canals [12] navigable in themselves, subject to the ebb and flow of the tides, and connected to other pre-existing navigable waterways.

It is time, Relators submit, for the highest Court of this State to speak definitely on this subject, which is so important in a State blessed with wetlands, a coastline, and a maze of waterways of natural and artificial origin which are wed to each other and flow together.

Respectfully submitted,

MOUTON, ROY, CARMOUCHE, BIVINS & HILL

BY: /s/ John Hill
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AFFIDAVIT

STATE OF LOUISIANA

PARISH OF LAFAYETTE

BEFORE ME, the undersigned authority, Notary Public in and for the aforesaid Parish and State, this 6 day of March, 1978, personally came and appeared:

JOHN K. HILL, JR., to me personally known, who on his oath did depose and say:

That he is the attorney of record for Relators in the foregoing matter; that he has prepared the foregoing Application for Writ of Certiorari or Review; that the allegations of fact contained therein are true and correct to the best of his knowledge, information and belief.

Appearer further declares that a copy of the above and foregoing Application for Writ of Certiorari or Review has been duly mailed to counsel for respondents, Mr. Charles Sonnier, by depositing a copy thereof in the United States Mail, properly addressed and postage prepaid on the 6 day of March, 1978.

/s/ John K. Hill, Jr.
JOHN K. HILL, JR.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 6th DAY OF MARCH, 1978, AT LAFAYETTE, LOUISIANA.

/s/ illegible
NOTARY PUBLIC